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No. .....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

BELLE FOURCHE PIPELINE COMPANY,
EQUITABLE OIL PURCHASING COMPANY,
EIGHTY-EIGHT OIL COMPANY,
BLACK HILLS TRUCKING, INC.,
J. FRANK POTTORFF AND H. A. TRUE, JR.

Petitioners,

v.

UNITED STATES OF AMERICA AND
FEDERAL ENERGY REGULATORY COMMISSION,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

Did the Court of Appeals err in dismissing a declaratory judgment of a district court, rendered after a full trial on the merits determining the non-jurisdictional status of targets, thereby resolving a ten year dispute over jurisdiction, and preventing further agency abuse and irreparable injuries to targets, where the agency did not appeal the jurisdictional issue and confined its appeal to its subpoenas that had been enjoined; where the Court of Appeals did not review the declaratory judgment, confined its review to the subpoenas and held that the district court had lost his jurisdiction over both the declaratory judgment and subpoenas for lack of "ripeness" for the sole reason that targets had an adequate legal remedy to challenge the subpoenas in a subsequent enforcement action, and failed to consider that targets had no legal remedy to stop the agency from collecting evidence to prosecute them for violations of inapplicable laws, or to stop the agency from enforcing identical subpoenas against their shippers and customers, or to resolve the dilemma of whether to comply with conflicting state or federal laws and regulations, or to prevent damage to target's business by the agency's investigation of their shippers and customers?

II.

Did the Court of Appeals err in dismissing for "lack of ripeness" an order of the district court restraining the further enforcement of "overbroad and unreasonably burdensome" subpoenas demanding virtually all of targets' records for five years after 13,000 documents were taken, issued by the agency against four non-jurisdictional targets seeking evidence to prosecute those targets for violations of inapplicable federal laws, where the district court found, after a trial on the merits, that the agency had no regulatory jurisdiction over targets, had no legitimate purpose to investigate the four targets since it was not

inve igating its own jurisdiction or any regulated entity or matter under its jurisdiction, but where the investigation was authorized by the Commission on erroneous advise of the agency that targets were jurisdictional?

III.

Did the Court of Appeals err in finding that the district court had abused his discretion in holding that the agency in substance had counterclaimed for enforcement of the subpoenas and had thereby conferred jurisdiction in the district court under 49 U.S.C. § 12(2), after a full trial on the merits where the agency was represented by its General Counsel and urged a resolution of the jurisdictional issues to enforce their subpoenas?

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Belle Fourche Pipeline Company ("Belle Fourche"), Equitable Oil Purchasing Company ("Equitable"), Eighty-Eight Oil Company ("88") and Black Hills Trucking, Inc. ("BHT") and their principal officers, J. Frank Pottorff (now deceased) and H. A. True, Jr.,[1] petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit dismissing for lack of subject matter jurisdiction a district court's declaratory judgment that petitioners were not subject to regulatory jurisdiction of the Federal Energy Regulatory Commission ("FERC"), and an order of the district court enjoining the further enforcement of subpoenas *duces tecum* seeking evidence to prosecute the petitioners for the violation of

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[1] No parties appeared in the proceedings before the Court of Appeals except those shown in the caption above.

certain provisions of the Interstate Commerce Act, 49 U.S.C. Sections 1, et seq., which are inapplicable to non-jurisdictional entities, for the sole reason that the subpoenas were not "ripe" for review because "an adequate legal remedy existed for challenging the validity of the subpoena(s) in a subsequent enforcement hearing", without considering the irreparable injuries to be suffered by the targets if a determination of their jurisdictional status was deferred.

OPINIONS BELOW

The Opinion of the Court of Appeals, styled *Belle Fourche Pipeline Company, et al.* v. *FERC,* is reported at 751 F.2d 1350, (10th Cir. 1984) and appears as Appendix A. The opinion of the district court of January 20, 1983 is reported at 554 F.Supp. 1350, (D.Wyo. 1983) and appears in Appendix B.

JURISDICTIONAL GROUNDS

The judgment of the Court of Appeals was entered on December 27, 1984, and rehearing was denied on February 1, 1985. (See App. C) Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statutes involved are the Interstate Commerce Act ("ICA") and the jurisdictional provisions set forth in 28 U.S.C. §§ 1331 and 1337. Pertinent provisions of these statutes are set forth in Appendix D.

STATEMENT OF THE CASE

This case is the culmination of a ten year controversy between the FERC (and its predecessor, the Interstate Commerce Commission ["ICC"]) whether the four petitioners are subject to federal or state jurisdiction.

The Petitioners

Belle Fourche owns three separate oil pipeline systems that are not interconnected. Two of the systems, the North Dakota-Montana System, and the Silvertip System are clearly interstate and subject to FERC regulatory jurisdiction. The third system, referred to herein as the Wyoming System, is located wholly within the State of Wyoming.

BHT owns and operates common carrier tank trucks that transport crude oil from Wyoming wells to the Wyoming System.

88 is a crude oil trader that buys crude oil and transports it over the Wyoming System for resale at the end of the system.

Equitable operates a gravity bank for the shippers over the Wyoming System to compensate them for changes in gravity resulting from common stream transportation.

Neither BHT, 88 nor Equitable have any relationship whatsoever with Belle Fourche's North Dakota-Montana or Silvertip Systems. As the district court found, the activities of these three companies involved here, and Belle Fourche's Wyoming System, are wholly intrastate in nature and are not subject to FERC's regulatory jurisdiction.

Background of the Dispute Over Jurisdiction

In 1963 the Wyoming Public Service Commission, ("Wyoming PSC"), in *Belle Fourche Pipeline Company* v. *Butte Pipeline Co.* (App. E) ruled that Belle Fourche's Wyoming System was intrastate in nature and subject only to state regulations. Since that decision Belle Fourche has obtained certificates of convenience and necessity from the Wyoming PSC, has filed tariffs and complied with its regulations, which differ substantially from FERC regulations.

On August 29, 1973 Inexco Oil Company ("Inexco") a shipper over the Wyoming System, filed a complaint with the ICC

against the predecessors of the four petitioners ("the targets") for alleged violations of the ICA. At Inexco's request, subpoenas *duces tecum* were issued by the ICC against the four targets demanding their business records. The targets disputed the ICC's jurisdiction and, after their administrative remedies were exhausted, filed suit in the federal district court at Cheyenne, Wyoming on July 7, 1974 to obtain a hearing over these jurisdictional issues. The ICC counter-claimed for enforcement. However, on January 29, 1975, before any decision was reached concerning the jurisdictional status of the targets, Inexco withdrew its complaint before the ICC. On May 5, 1975, the ICC withdrew its counter-claim for enforcement and the lawsuit was dismissed. However, on April 9, 1975 the ICC decided to further investigate the complaint after Inexco withdrew and opened ICC Docket No. 35895 (sub — no. 1). After reviewing the four targets' records at Casper, Wyoming with the cooperation of the targets the ICC took no further action. When ICC proceedings were transferred to FERC in 1977, Docket No. 35895 (sub — no. 1) was not included in the dockets transferred.

The FERC Investigation

In March, 1981, the FERC Office of Enforcement ("the agency") revived the investigation against all four targets and on December 30, 1981, filed a memorandum with the Commission in closed session requesting authority to issue subpoenas ("the FERC Memo")[2]. The FERC memo stated: "there can be no dispute that [the Wyoming System] pipelines in question are 'common carriers for hire' subject to Commission jurisdiction under the Interstate Commerce Act"; and that "the question

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[2] The FERC Memo was a secret document produced at the trial at the order of the district court. It was taken up on appeal by the FERC who later requested that it be impounded by the Court. The Tenth Circuit apparently refused to consider this Memo although it was considered by the district court and referred to by the Court in his opinion. App. B, p. B-4.

remains whether the operations of the remaining True corporations are sufficiently related to the operations of the pipelines to be properly characterized as part of those pipelines' common-carrier operations". The FERC Memo went on to recommend the investigation of the four targets for operation of the gravity bank, certain trucking operations, and buy-sell agreements involving the Wyoming System, for alleged violations of the ICA and Elkins Act, 49 U.S.C. § 41, including criminal penalties, criminal sanctions, civil remedies, and treble damages.

The FERC Memo further stated:

> "If the operations of the various True corporations are deemed a part of [Belle Fourche's] common carrier operations, then two of the corporations' activities, [Equitable's] maintenance of the gravity bank and [88's] implementation of buy-sell agreements, may each constitute a performance of an untariffed service".

The agency was fully aware that Equitable operates only in connection with the Wyoming System, for the following statement appears in the FERC Memo:

> "[Equitable] is also a separate corporation which operates a "gravity bank" in connection with transportation of crude oil on Belle Fourche's *Wyoming* pipeline. This appears to be Equitable's sole function." (Emphasis added).

The agency was also aware that the Wyoming System "operates solely in Wyoming".

The FERC Memo recited that data requests had been sent to twenty of Belle Fourche's Wyoming shippers (who are also customers of 88, BHT and Equitable).

Misled by the agency's false assertions of FERC jurisdiction as contained in the FERC Memo, the Commission instituted a "private investigation" against petitioners by order dated December 30, 1981. On January 19, 1982, the agency served subpoenas *duces tecum* upon petitioners requiring the production, at the FERC offices in Washington, D.C., of an estimated

590 file drawers of documents, or virtually all of the documents in the four companies' possession for the last five years. Similar subpoenas were also served on the shippers and customers of the four targets. To avoid this massive production of documents, petitioners invited the FERC to come to their offices in Casper, Wyoming, to conduct the investigation, in hopes that the agency would satisfy itself as to its lack of regulatory jurisdiction over petitioners as the ICC had apparently done[3]. A team of two lawyers, two accountants, and three clerks appeared at petitioners' offices in Casper, Wyoming, and after two weeks had copied approximately 13,000 documents all related to non-jurisdictional, intrastate operations of the four targets. It was obvious from the documents taken that the agency was not making any investigation of its own jurisdiction, nor was it investigating the North Dakota — Montana or Silvertip Systems, nor any other matter within its regulatory jurisdiction. Instead it became obvious that the sole purpose of the investigation was to collect evidence to prosecute the four targets for ICA and Elkins Act violations realted only to their Wyoming intrastate operations on the assumption that FERC had regulatory jurisdiction over them.

The Declaratory Judgment Suit

Petitioners filed a complaint against FERC before the United States district court at Cheyenne, Wyoming on April 29, 1982, similar to the suit the targets had filed against the ICC in 1974. In their suit they sought a declaratory judgment that the operations of the four target companies were solely intrastate in nature and therefore beyond the regulatory jurisdiction of FERC. Petitioners also sought to enjoin FERC from further enforcing the subpoenas against petitioners and to enjoin the agency from enforcing the subpoenas which the agency had

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[3] When this invitation was made, the petitioners were unaware of course of the secret FERC Memo and the fact the agency had already pre-judged its jurisdiction over petitioners.

served on petitioners' shippers and customers. A temporary restraining order was granted by the district court.

A hearing for a preliminary injunction was consolidated with a trial on the merits by agreement of the parties, and the case was tried before the district court at Casper, Wyoming on May 13-14, 1982. At the trial, the issue of whether FERC had regulatory jurisdiction over petitioners was vigorously contested by the agency, represented by the General Counsel of FERC and several members of his legal staff. They subpoenaed shipper witnesses, presented testimony, submitted briefs and made oral arguments in an effort to prove that the FERC had regulatory jurisdiction over the four targets. It was obvious to the Trial Court that the agency needed and wanted a judicial resolution of the jurisdictional dispute so that it could enforce the full breath of its subpoenas against targets.

However, the agency admittedly was not investigating to determine if it had jurisdiction. Marilyn Doria, Assistant General Counsel of the FERC for Enforcement, after being questioned by the district court, admitted that the subpoenas were issued and the investigation conducted without any consideration being given to the question of whether or not the FERC had jurisdiction over the targets.

In a Memorandum Opinion dated January 20, 1983, the district court found that it had subject matter jurisdiction over the case under 28 U.S.C. §§ 1331 and 1337 since the case involved an interpretation of the ICA. The court declared the undisputed evidence revealed the four targets were all intrastate in nature and not subject to FERC's regulatory jurisdiction. Insofar as the subpoenas were concerned, the court also found that since FERC possessed regulatory jurisdiction over Belle Fourche's North Dakota — Montana and Silvertip Systems, the FERC derived investigative authority under Section 12(1) of the ICA, 49 U.S.C. § 12(1), to seek information from the targets, as affiliates of Belle Fourche, pertaining to the management of the

interstate operations. However, since the undisputed evidence showed that the 13,000 documents already taken by the agency did not relate to the Belle Fourche's interstate operations, and since the FERC Memo confirmed the agency investigation had no legitimate purpose but was directed solely at the four non-jurisdictional targets, the district court concluded that the subpoenas demanded documents in excess of the agency's investigative authority under Section 12(1) and entered an order enjoining any further exercise of the "overbroad and unreasonably burdensome" subpoenas issued against the non-jurisdictional activities of petitioners[4].

On appeal, the Court of Appeals ignored the declaratory judgment aspect of the case and viewed the case as a simple pre-enforcement attack on an agency subpoena, and held that the district court lacked subject matter jurisdiction to entertain "this pre-enforcement suit" because the dispute over the subpoena was not sufficiently developed or "ripe" to create subject matter jurisdiction. In its opinion, the Court of Appeals stated that district court jurisdiction would not arise until the agency filed an enforcement action under 49 U.S.C. § 12(2),(3), App. D and concluded that the targets' rights were adequately protected because they "could challenge the subpoena on any appropriate ground" at the enforcement hearing, citing *Reisman* v. *Caplin*, 375 U.S. 440, 449 (1964).

It is indeed unfortunate the Court of Appeals chose not to review the jurisdictional aspect of the case, which was a principal reason suit was filed in the first place. It is petitioners' contention the jurisdictional issues were ripe for review even if there had been no outstanding subpoenas against the targets because of the ten year conflict over state/federal jurisdiction

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[4] In a *nunc pro tunc* order dated July 13, 1983, the court made it clear that he had "found that the subpoenas themselves were unreasonably broad and burdensome insofar as the investigation concerned Belle Fourche's intrastate operations . . ."

questions and the subpoenas issued against petitioners' customers and shippers. The net effect of the ruling by the Court of Appeals was to deny petitioners their day in court insofar as the declaratory judgment on the jurisdictional questions are concerned.[5]

Crude oil trading is highly competitive and confidential, and the subpoenaed documents will expose trade secrets and confidential customer information that cannot be protected against public exposure under federal laws after seizure by the agency.

REASONS FOR GRANTING THE WRIT

The issues presented here are of major significance because if the decision of the Circuit Court stands, a nonjurisdictional target of an agency investigation will be powerless to obtain a juricial interpretation of jurisdictional status to protect itself from agency abuse and the seizure of its documents from third parties. The limited investigative authority conferred on FERC under Section 12(1)(a) of the ICA should not be enlarged to permit the investigation of affiliates of the regulated entities to make them the sole targets for ICA violations.

I.

The Court of Appeals Erred in Failing to Find That the Impact of the Agency Action Was Sufficiently Direct and Immediate To Render the Issues Appropriate For Judicial Review by the District Court

This dispute clearly fell on the "[*Abbott*] side of the *Reisman/Abbott* fence", *Wearly* v. *F.T.C.*, 616 F.2d 662, 668 (3rd Cir. 1980), *cert. denied* 449 U.S. 882 (1980), in view of the

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[5] The Court of Appeals did not express any opinion as to whether the jurisdictional issues would be "appropriate grounds" for review in a subsequent enforcement action. The FERC will undoubtedly contend such issues are not "ripe", even in such a proceeding.

agency's pre-judgment of the jurisdictional issues. This conclusion is firmly supported by the following facts: The agency's investigation was directed solely against four targets[6] which the district court found to be outside its regulatory jurisdiction and did not relate to any matter properly within FERC jurisdiction; the agency was taking thousands of documents from the targets, their shippers and customers to build a case for prosecution on the erroneous conclusion that the targets were jurisdictional; and the petitioners will suffer irreparable injuries unless the jurisdictional issues are resolved prior to any enforcement action brought by the agency. The petitioners now are powerless to prevent the taking by the agency of their confidential business documents from their shippers and customers[7], and are caught

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[6] In *S.E.C.* v. *Jerry T. O'Brien, Inc.*, ... U.S...., 104 S. Ct. 2720 (1984) ("*O'Brien*"), this Court observed that under S.E.C. investigative rules, there was no definition of the term "target", and the difficulty in determining who the actual "targets" of an investigation might be in a particular case militated against imposing a requirement on the agency to notify "targets" of the service of subpoenas on other or "third parties" to the investigation. 104 S.Ct. at 2729. Similarly here, neither the FERC investigative rules nor the ICA define the terms "target". However, any difficulty in determining the "target" does not exist in this case. Contrary to the broad investigatory powers under S.E.C. laws, the FERC is limited by statute to investigating affiliates or third parties *only* to the extent such parties may be involved with the business of a regulated carrier actually conducting interstate transportation under the ICA. 49 U.S.C. § 12(1)(a). No regulated carrier was being investigated here. Furthermore, the FERC Memo itself stated who the "targets" were, and this conclusion became obvious when the agency took 13,000 documents, all of which were related to the intrastate Wyoming operations of petitioners as sole targets of the investigation. By expressly and factually targeting nonjurisdictional companies, outside the limited reach of FERC under § 12(1) of the ICA, the investigation simply failed to meet the first standard required for enforcement: that the "investigation will be conducted pursuant to a legitimate purpose" *United States* v. *Powell*, 379 U.S. 48, 57-58 (1964); quoted in *O'Brien, supra*, 104 S.Ct. at 2728.

[7] This Court noted in *O'Brien* that the right of a target to seek intervention in an enforcement action against a third party was discretionary, citing *Donaldson* v. *United States*, 400 U.S. 517, 529 (1971) and that the Court had never before expressly held that a

on the "horns of a dilemma" whether to comply with state or federal regulations.

The district court unquestionably had subject-matter jurisdiction under 28 U.S.C. § § 1331 and 1337 since the action arose out of and required an interpretation of the ICA and also involves a federal question. The Court of Appeals does not deny that jurisdiction existed under those statutes, but held the subject matter jurisdiction was lost because of lack of "ripeness" for review.

The doctrine of "ripeness" is one of discretion rather than jurisdiction and the Circuit Court erred in concluding that the district court had abused his statutory jurisdiction by finding that the impact of the agency's action was sufficiently direct and immediate to render the issue appropriate for his jurisdictional review, after the facts had been fully disclosed to him at the trial.

II.

The Court of Appeals Fell into Error Because it Failed to Recognize the Distinction Between An Agency that Abuses its Jurisdiction From One That Proceeds Against Persons or Entities Over Whom they Have Absolutely no Jurisdiction

A dependency on the authority of *Reisman* v. *Caplin*, 375 U.S. 440 (1964), cited by the Court of Appeals in support of its decision, is misplaced. In *Reisman* there was no question the IRS had jurisdiction to investigate the taxpayer and obtain the taxpayer's records, and the taxpayer could have his day in court by intervening in a subpoena action against his accountants and

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target could obtain a restraining order preventing voluntary compliance by a third party with an administrative subpoena, as suggested by dictum in *Reisman*. *O'Brien*, 104 S.Ct. at 2729. But this Court nevertheless assumed that such right did exist in deciding *O'Brien*, since it was not pertinent to the issue of whether an agency must give notice to targets of the issuance of third-party subpoenas.

refusing to permit the disclosure of the records prior to enforcement review.

To equate *Reisman* v. *Caplin* with the case at bar, assume, *arguendo,* that the documents under subpoena in *Reisman* belonged to a person over whom the IRS had no jurisdiction. Surely under such facts the *Reisman* case "would have fallen on the [Abbott] side of the Reisman/Abbott fence." When the wrong person is arrested by mistake, he is entitled to immediate relief. The power of the FERC to act with respect to a party should be properly determined as a seminal issue at the outset of any investigation.

Frozen Food Express v. *U.S.,* 351 U.S. 40, (1956) which is referred to by Justice Harlan in the *Abbott* cases, clearly controls this case. There, the ICC had specified certain commodities deemed to fall within the statutory class as "agricultural commodities". Vehicles transporting such commodities were exempt from ICC supervision. Frozen Food claimed to be transporting exempt commodities not included in the list and filed suit in district court. The Supreme Court found "ripeness" because a jurisdictional issue was involved, even though Frozen Food could have violated the regulation and run the risk since, as the Court held, the ICC regulation would have become effective "only if and when a particular action was brought against a particular carrier".

Comparing the case at bar with *Frozen Food,* the FERC preliminary decision, based soley on presumptions by which it classified Belle Fourche's Wyoming System as jurisdictional, had the same impact on Belle Fourche as the "agricultural commodities" misclassification had on Frozen Food. In both cases, the final agency action was misclassifying the carriers' jurisdictional status. The impact of the commission's acceptance of the FERC General Counsel's opinion on jurisdiction was "sufficiently direct and immediate as to render the issue appropriate for judicial

review at this stage". *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 153 (1967).

In *Rocky Mountain Oil & Gas Assn.* v. *Watt*, (1982) 696 F.2d 734, 741, the Tenth Circuit found an issue was fit for judicial decision when the agency adopted the Solicitor's statutory interpretation and put it in a handbook. This was considered final agency action as part of the "ripeness" test. The same latitude in exercising its discretion of the "ripeness" issue was not afforded the district court in this case, however.

In another recent case, *McCombs* v. *F.E.R.C.*, 705 F.2d 1177 (1980) (withdrawn on stipulation of counsel, 710 F.2d 611 [1983]), the Tenth Circuit found "ripeness" in a case where the FERC refused to dismiss a party on jurisdictional grounds. In that case, FERC took the position, as it does here, that the jurisdictional issue might be avoided if the Commission eventually decided not to take action. The Tenth Circuit refused to buy this argument. Judge Barrett had this to say:

> "We also hold that the jurisdictional issue is *ripe* for review under the criteria of *Abbott Laboratories* v. *Gardner*, *supra*. It is prudent that this Court decide the issue now. The issue of jurisdiction, or the Commission's power to act with respect to a party, is logically the issue which should be decided initially." 705 F.2d at 1186.

Quoting from *Coca-Cola Company* v. *F.T.C.*, 474 F.2d 299, 303 (5th Cir. 1973), cert. denied 414 U.S. 877, Judge Barrett continued:

> "The most widely recognized exception to the general rule against judicial consideration of interlocutory agency rulings is the class of case where an agency has exercised authority in excess of its jurisdiction or otherwise acted in a manner that is clearly at odds with the specific language of a statute." 705 F.2d at 1186.

Three other cases that recognize the distinction between deferring to an agency on issues related to a determination of "scope of authority" as contrasted with cases where there is a

total lack of jurisdiction are: *C.A.B.* v. *D.L.A.*, (D.C. Cir. 1979) 591 F.2d 951, 952; *El Paso Natural Gas Co.* v. *Sun Oil Co.*, (5th Cir. 1983), 708 F.2d 1011; and *F.E.C.* v. *Machinists Non-Partisan Political League*, 655 F.2d 380 (D.C. Cir. 1981). In the latter case, the D.C. Circuit reversed a decision of the trial court because the judge failed to determine whether the commission had subject-matter jurisdiction over the area being investigated before enforcing the subpoenas. The Circuit Court stated that the highly deferential attitude which courts usually apply to subpoenas from agencies "whose subject-matter jurisdiction is unquestioned" was not applicable when the agency exceeded its jurisdiction.

III.

The Court of Appeals Erred in Finding the Agency Was Conducting "an Ongoing Investigation Which . . . Was Within the FERC's Authority To Conduct" When in Fact the Undisputed Evidence Disclosed the Agency Had far Exceeded Its Authority Under Section 12(1) of the ICA

Section 12(1) of the ICA permits the agency to question affiliates of any regulated carrier *only* "to the extent that the business of such persons is related to the management of the business" of the regulated carrier being investigated. Here, the undisputed facts clearly revealed, after 13,000 documents had been taken, the agency was making no inquiry into the business of any carrier subject to its interstate regulatory jurisdiction.

It is clear that the agency had the right, as the district court found, under Section 12(1) of the ICA, if it had chosen to do so, to investigate the four targets as affiliates of the two interstate common carriers under its jurisdiction, but *only* "to the extent that the business of such persons is related to the management of the business" of the carrier being investigated, 49 U.S.C. § 12(1). Here, however, the facts are undisputed that the agency

was making no inquiry into the business of any regulated carriers, but had directed its full subpoena powers toward the four non-jurisdictional companies as the sole targets of the investigation.

The agency also had the right, and we submit, the duty to investigate its own jurisdiction; but, as shown above, admitted at the trial upon inquiry by the district court that it was not investigating its own jurisdiction. To the contrary, it produced a document (the FERC Memo) which revealed that the reason the agency was investigating the four target companies was because of a legal opinion and advice given the Commission unsupported factually that the Wyoming system was interstate in nature and therefore was subject to FERC's regulatory jurisdiction and the other three targets were also believed to be under FERC's regulatory jurisdiction. Acting upon this unreliable advice, the Commission entered an order authorizing a non-public investigation of all four companies. It is plainly evident, that were it not for this bad legal advice, this investigation would never have been authorized by the Commission.

Having prejudged its own jurisdiction and having treated the four targets as jurisdictional without any thought of further inquiry on that issue, the agency demanded virtually all of the documents in the four target companies' possession for the last five years. This extreme action involved 590 file drawers of private business records and disrupted the operation of the four companies to enable the agency to prepare for prosecution under the ICA. Similar extensive subpoenas *duces tecum* concerning the same kinds of documents were also served on the shippers and customers of petitioners.

IV.

The Court of Appeals Erred in Refusing to Accept the District Court's Finding That the FERC by the Posture it Voluntarily Took in This Case Effectively Undertook to Sustain the Validity of and Enforce its Subpoenas, Thereby Relieving the District Court of its Discretionary Authority and Making the Procedural Issue of "Ripeness" Inapplicable

During the trial, the agency attempted to justify its actions by claiming regulatory jurisdiction over the four targets as being interstate in nature. There can be no question that the jurisdictional issues were fully submitted to the district court for decision by FERC's counsel and tried by consent as the district court found. The record contains no evidence to the contrary. Both parties put on witnesses and testimony in this regard, and briefs were filed by both sides arguing the jurisdictional issue. Instead of being a "mere procedural quibble" as characterized by the Tenth Circuit, it was a full scale two-day trial in which major shippers were subpoenaed by the plaintiffs and defendants to verify the true nature of the Wyoming System's operation.

Since the hearing was held in Casper, Wyoming, the headquarters of all four targets, and a place easily accessible to the shippers over the Wyoming System, the hearing on the jurisdictional issues was thorough and complete. This can never be duplicated without great and burdensome inconvenience and expense in a subsequent enforcement action in Washington, D.C. To require the issues to be decided in a subsequent enforcement action at a distant location more than 1700 miles away would be a waste of financial resources of the parties as well as a frittering away of available judicial resources of the district court already invested in determining through a trial this basic jurisdictional question in this case.

The agency was legally charged with knowing that its powers to investigate non-jurisdictional entities as affiliates of a jurisdictional entity under Section 12(1) of the ICA was more limited

than its power to investigate jurisdictional entities. Therefore a determination of the jurisdictional status was essential to the continued and complete enforcement of the subpoenas. Rather than stand alone on the procedural issues, the agency chose to contest vigorously the jurisdictional issues, putting in their first team, the General Counsel of the FERC and several of his assistants, who presented evidence, filed briefs and made oral arguments on the jurisdictional issues. Having lost the jurisdictional fight, but having chosen not to appeal it, the agency should now be bound by the district court's declaratory judgment. It would be patently unfair to let the agency sidestep this jurisdictional decision on procedural grounds, and thus "get two bites of the apple".

The district court in its Opinion reviewed the facts as follows:

> "The [FERC] has repeatedly argued that the Plaintiffs' method of contesting the validity of the subpoena is not proper, asserting that the Plaintiffs' claims are not ripe for review and the correct procedure is for the Plaintiffs to refuse compliance with the subpoena and for the agency to bring an enforcement action. It is argued that the Plaintiffs may assert their rights only after the agency has sought judicial enforcement. Such an argument elevates form over substance. The Plaintiffs contend that the subpoenas are invalid. Defendant alleges that the subpoenas are valid, and it wishes to continue its private, secret investigation. Although it has not formally counterclaimed for enforcement, that is the result it seeks, else it would not be contesting Plaintiffs' claims so vigourously. In other actions where the party subpoenaed has been the first to bring suit, and the agency by counterclaim has sought enforcement of the subpoena, the courts have found jurisdiction. *Comet Electronics, Inc.* v. *U.S., supra; Servitron, Inc.* v. *I.C.C., supra.* To find a difference in this case, merely because FERC has done all it can to enforce its subpoenas except make a formal request of this Court to do so, would make us slavish adherents to form over substance.
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> * * *

> Finally, the agency has in effect asked this Court to enforce the subpoenas, by not enjoining its investigation, and thus jurisdiction is conferred by the Interstate Commerce Act's explicit provisions."

Thus the district court was fully justified in concluding that FERC had tried by implied consent the issue of whether the subpoenas are justified because Plaintiffs' operations are interstate in character and therefore within FERC's regulatory jurisdiction under the Interstate Commerce Act, and that by contesting this issue, FERC has effectively pleaded for enforcement of the subpoenas. Fed.R.Civ.P. 15(b). *Ellis* v. *Arkansas Louisiana Gas Co.*, 609 F.2d 436, 439-40 (10th Cir. 1979) *cert. denied* 445 U.S. 964; *de Hass* v. *Empire Petroleum Co.*, 435 F.2d 1233, 1229 (10th Cir. 1970); *Simms* v. *Andrews*, 118 F.2d 803, 807 (10th Cir. 1941). The trial court's finding that the issue was tried by consent is reviewable only on a showing that he abused his discretion in so finding. *Ellis, supra.*

Moreover, the district court was *required* to conclude that this issue, tried by consent, was thereby deemed raised by the pleadings, for the provisions of Rule 15(b) in this regard are mandatory.[8] *See, e.g. Laffey* v. *Northwest Airlines, Inc.*, 569 F.2d 429, 478 (D.C. Cir. 1976) *cert. denied* 434 U.S. 1066. Judge Brimmer properly concluded that the briefing, trial, and argument of this issue by implied consent constituted an effective counterclaim. *Craig Food Industries, Inc.* v. *Taco Time International, Inc.*, 469 F.Supp. 516, 523 (N.D. Utah 1979).

In sum, the district court was correct in concluding that express federal jurisdiction over the case existed under 49

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[8] "When issues not raised by the pleadings are tried by express or implied consent of the parties, they *shall* be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment, but failure to do so amend does not affect the result of the trial of these issues." Fed.R.Civ.P. 15(b) [Emphasis added].

U.S.C.A. § 12(2). This statutory jurisdiction existed and was necessarily invoked by the deemed assertion by FERC of the counterclaim for enforcement of its subpoenas which arose from trying the issue by consent. *Comet Electronics, Inc.*, v. *U.S.*, 381 F.Supp. 1233, *aff'd* 420 U.S. 999 (1975); *Servitron, Inc.* v. *I.C.C.*, 380 F.Supp. 1344, *aff'd* 420 U.S. 599 (1975), *see also Wong* v. *Bacon*, 445 F.Supp. 1177, 1188 (N.D. Cal. 1977); *Byrnes* v. *Faulkner, Dawkins & Sullivan*, 362 F.Supp. 864, 868-870 (S.D. N.Y. 1973); *Crest Auto Supplies, Inc.* v. *Ero Mfg. Co.*, 246 F.Supp. 224, 229 (N.D. Ill. 1965) *aff'd* 360 F.2d 896 (7th Cir. 1966).

V.

The District Court Properly Exercised Its Jurisdiction to Avoid the Conflict Between State and Federal Jurisdiction

In the ICA, Congress expressly reserved the right of the states to regulate intrastate pipelines. 49 U.S.C.A. § 1(2)(a) (Supp. 1985). The Wyoming PSC has, in a formal proceeding, declared the Belle Fourche Wyoming System to be intrastate, has issued certificates, promulgated regulations, and approves its tariffs. *Belle Fourche Pipeline Co.* v. *Butte Pipeline Co.*, 51 P.U.R. 3rd 189 (Wyo. PSC 1963). The FERC investigation was a direct invasion into the jurisdiction of the Wyoming PSC. It was essential that the district court act to enforce this congressional purpose and make a clear delineation between FERC and Wyoming PSC jurisdiction as a matter of law.

VI.

The District Court's Decision Should not be set Aside Absent A "Clear Abuse of Discretion"

In *Rocky Mountain Oil & Gas Ass'n.* v. *Watt*, 696 F.2d 734 (10th Cir. 1982), the Tenth Circuit held that when the district court makes a factual finding of harm, as the district court did here on the "ripeness" issue, the Court of Appeals "may not

overturn the district court's conclusion unless we find it clearly erroneous. Fed.R.Civ.P. 52(a)". This is a correct statement of the rule and should have been applied by the Circuit Court in the instant case.

Certainly, the district court did not abuse his discretion in exercising his statutory and residual subject matter jurisdiction. He had the authority and the duty to resolve the jurisdictional issue presented to him by both parties of whether the target's activities were interstate or intrastate in character, and therefore his refusal to enforce the subpoenas beyond FERC's limited statutory investigative authority under Section 12(1) was clearly proper. The 13,000 documents already taken by the agency should have sufficed for their limited investigative authority under Section 12(1)(a) of the ICA.

On page 5 of its opinion the Tenth Circuit states that the Supreme Court in *Reisman* v. *Caplin* "noted that at [the] enforcement hearing the investigated party could challenge the subpoena on any appropriate ground." That may have been true in that case, but the government, in any subsequent enforcement proceeding of subpoenas against these parties will undoubtedly claim the jurisdictional issues are not "ripe" for resolution in an enforcement action. Instead, the government undoubtedly will argue jurisdictional issues can only be resolved after investigation of the facts. FERC Brief 17. Another court could so hold thus preventing the targets from ever bringing this jurisdictional issue to conclusion in a timely fashion despite the threshhold status this question normally has in any kind of proceeding.

What is more likely to happen if this decision stands, based on the ten-year investigation these targets have already experienced is the jurisdictional issue will be placed in perpetual limbo by non-action, while the agency continues to collect confidential data from the shippers and customers of the targets detrimental to their business interests.

VII.

The Court of Appeals' Dismissal of the Declaratory Judgment Without Review When the Agency had Failed to Appeal on This Issue Deprived Petitioners of Their Constitutional Rights to a Day in Court

The record is clear that one of the primary reasons petitioners sought relief from the district court was to resolve the ten year dispute over their jurisdictional status to stop the agency from collecting evidence against them as targets of federal violations that were not applicable to them as non-jurisdictional entities, and to stop the irreparable harm caused by the investigation and subpoenas against their shippers and customers and the state/federal regulatory conflict.

Under these facts, a sufficient case or controversy was actually presented to the trial court which justified granting a declaratory judgment that the targets were nonjurisdictional. *Chicago* v. *Atchison, Topeka & Santa Fe Railway Co.*, 357 U.S. 77 (1958); *Baltimore Shippers and Receivers Ass'n.* v. *California P.U.C.*, 268 F.Supp. 836, *aff'd* 389 U.S. 583 (1967). Certainly, this was not a situation involving mere possibilities or hypothetical situations alleged by a party seeking a declaration of his jurisdictional status which would preclude declaratory judgment. *See, e.g., Public Service Commission of Utah* v. *Wycoff Co.*, 344 U.S. 237 (1952).

The agency, instead of appealing from the declaratory judgment, effectively side-stepped the adverse decision on the jurisdiction by misleading the Court of Appeals that the subpoena injunction was the only issue in the case.

The Court of Appeals fell into this procedural trap and decided the case on the basis of *Reisman* v. *Caplin*, which applied only to the agency subpoenas against targets and dismissed both the declaratory judgment on jurisdiction and the

subpoena injunction. In so doing, the Court of Appeals deprived petitioners of its basic constitutional right to a day in court.

Petitioners were entitled to the same review rights on the declaratory judgment decision that it would have had if no injunction had been issued. Obviously, no such review rights were afforded petitioners.

CONCLUSION

For unknown reasons, the agency is attempting to expand its powers beyond those expressly granted by the ICA. The novel extension of FERC's investigative authority by the use of its internal "private investigation rules" — which FERC equates to the "inquisitional power of a grand jury" — warrants careful scrutiny by this Court.

To require targets that are being investigated by mistake to suffer the indignities and expense of multiple legal proceedings in distant legal forums to resolve issues that have already been fully ventilated and decided after a full scale trial on the merits would be wasteful of judicial resources and unduly burdensome on innocent parties. For the foregoing reasons, this Court should grant its writ of certiorari to review the judgment of the Tenth Circuit dismissing for lack of ripeness the judgment of the district court declaring petitioners' non-jurisdictional status and prohibiting enforcement of overbroad subpoenas.

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CERTIFICATE OF SERVICE

I, Jack Vickrey, a member of the bar of this Court, hereby certify that I have this day caused copies of the foregoing Petition for Writ of Certiorari of Belle Fourche Pipeline Company, *et al.* to be placed in the care of the U.S. mail, certified mail, return receipt requested, to counsel at the following addresses:

FEDERAL ENERGY REGULATORY COMMISSION	Mr. Thomas E. Hirsch, III Federal Energy Regulatory Commission 825 North Capitol Street, N.E. Washington, D.C. 20426
DEPARTMENT OF JUSTICE	Mr. Bruce G. Forrest Civil Division Department of Justice Washington, D.C. 20530
UNITED STATES ATTORNEY	Mr. Richard A. Stacey U. S. Attorney 2120 Capitol Avenue Cheyenne, Wyoming 82001

. . . . . .

JACK VICKREY
ATTORNEY FOR
PETITIONERS,
BELLE FOURCHE
PIPELINE COMPANY,
ET AL.

. . . . . .

DATE

APPENDIX A

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

BELLE FOURCHE PIPELINE COMPANY, BLACK HILLS TRUCKING, INC., EQUITABLE OIL PURCHASING COMPANY, EIGHTY-EIGHT OIL COMPANY, J. FRANK POTORFF and H. A. TRUE, JR.,
Plaintiffs-Appellees,
v.
UNITED STATES OF AMERICA and FEDERAL ENERGY REGULATORY COMMISSION,
Defendants-Appellants.

No. 83-1384

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING
(D.C. No. C82-0145-B)

Before HOLLOWAY, Chief Judge, SETH and LOGAN, Circuit Judges.

LOGAN, Circuit Judge.

The United States and the Federal Energy Regulatory Commission (FERC) appeal from an order entered by the district court enjoining them from enforcing four subpoenas issued against the Belle Fourche Pipeline Company and three affiliated corporations, Black Hills Trucking, Inc., Equitable Oil Purchasing Company, and Eighty-Eight Oil Company. Because we find that the district court lacked subject matter jurisdiction to entertain this pre-enforcement, we discuss only that issue.[1]

[1] The United States and the FERC claim additionally that the district court erred in quashing these subpoenas as overbroad and unreasonable.

Belle Fourche operates an oil transportation system in Montana, North Dakota, and Wyoming. Belle Fourche owns oil pipeline systems, two of which transport oil across state lines. Belle Fourche also operates the Powder River pipeline system, entirely within the state of Wyoming. Black Hills Trucking owns and operates common-carrier tank trucks that transport oil from producing wells in Wyoming to various truck reception points in the Powder River system; it also provides trucking services to shippers in North Dakota. Eighty-Eight Oil Company purchases and markets crude oil in Wyoming and also ships a substantial portion of this oil through the Belle Fourche pipeline. Equitable Oil Purchasing Company operates a "gravity bank" in Wyoming for the Belle Fourche pipeline.[2]

In late 1981 the FERC initiated a private investigation of the Belle Fourche companies. *See* 18.C.F.R. §§ 1b.1-.20. Shortly thereafter an investigative officer for FERC issued subpoenas to the pertinent principals of these four Belle Fourche companies. In order to facilitate the investigation, the FERC agreed to send its employees to the offices of these companies and examine the subpoenaed documents rather than require their production at FERC headquarters in Washington, D.C. During the FERC's first visit to the companies' offices in Casper, Wyoming, the commission staff copies thousands of pages of documents.

During a mutually arranged second visit, plaintiffs informed the FERC officials of their intentions to enjoin the investigation. Thereupon, plaintiffs filed a complaint in the United States District Court for the District of Wyoming seeking declaratory and injunctive relief against the investigation on the ground that the investigation exceeded the FERC's authority. Plaintiffs alleged

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[2] A "gravity bank" is used by crude oil shippers that transport oil through a pipeline. The gravity of crude oil is a measure of its quality. Crude oil of higher gravity is generally more valuable than crude of a lower gravity. When a producer mixes its crude with crude of a different gravity the gravity bank compensates the producer for the difference.

jurisdiction pursuant to the Department of Energy Organization Act, 42 U.S.C. § 7192(b), the Administrative Procedure Act, 5 U.S.C. §§ 701-702, and the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202. On that same day, the district court granted plaintiffs' request for a temporary restraining order suspending the FERC's investigation. But it thereafter granted the FERC's motion to dismiss the case, holding that none of the provisions plaintiffs cited and relied upon gave the district court subject matter jurisdiction.

The plaintiffs then filed an amended complaint substantially identical to its first complaint except adding, to support jurisdiction, references to 28 U.S.C. §§ 1331, 1337, and 1361 and to the court's general equitable powers. Finding that a resolution of the dispute between the parties required an interpretation of the Interstate Commerce Act, the district court this time found it had federal question jurisdiction under 28 U.S.C. §§ 1331 and 1337. It permanently enjoined the FERC from attempting to enforce the issued subpoenas. Although the court found that the FERC was not exceeding its authority in conducting the investigation, it nevertheless found that the subpoenas were not "reasonably relevant" to the agency's authority because they were overbroad and unreasonably burdensome to the plaintiffs. The FERC appeals this determination, claiming the lower court erred in holding it had jurisdiction to decide these issues.

Subpoenas issued by the FERC are not self-executing; rather, to enforce them the FERC must seek an order from a federal district court compelling compliance with all or part of the subpoenas. *See* 49 U.S.C. § 12(2), (3). When an agency requests enforcement pursuant to 49 U.S.C. § 12(2) and (3) the federal court has subject matter jurisdiction. *See ICC* v. *Brimson*, 154 U.S. 447, 489 (1894).

In the case before us, the FERC never formally initiated enforcement proceedings in the federal district court. Instead, plaintiffs sought a protective order from the district court. The

district court regarded the dispute over whether the case was in the proper posture to vest the court with jurisdiction to suppress the subpoenas as a procedural quibble.

> "The Commission has repeatedly argued that the Plaintiffs' method of contesting the validity of the subpoena is not proper, asserting that the Plaintiffs' claims are not ripe for review and that the correct procedure is for the Plaintiffs to refuse compliance with the subpoena and for the agency to bring an enforcement action. It is argued that the Plaintiffs may assert their rights only after the agency has sought judicial enforcement. Such an argument elevates from over substance. The Plaintiffs contend that the subpoenas are invalid. Defendant alleges that the subpoenas are valid, and it wishes to continue its private, secret investigation. Although it has not formally counterclaimed for enforcement, that is the result it seeks, else it would not be contesting Plaintiffs' claims so vigourously."

R. II, 320. Its order later states that the FERC "has in effect asked this Court to enforce the subpoenas by not enjoining its investigation." *Id.* at 321.

The United States Supreme Court has addressed the propriety of pre-enforcement review when an object of an agency subpoena seeks injunctive relief. The principal question raised in such a proceeding is whether the dispute is sufficiently developed or "ripe" to create subject matter jurisdiction in the federal district court. In *Reisman* v. *Caplin*, 375 U.S. 440 (1964), the Supreme Court announced a rule strongly disfavoring any pre-enforcement review of investigative subpoenas. Specifically, that case held that a pre-enforcement order enjoining an Internal Revenue Service (IRS) subpoena was improper because an adequate legal remedy existed for challenging the validity of the supoena in a subsequent enforcement hearing. The court noted that at this enforcement hearing the investigated party could challenge the subpoena on any appropriate ground. *Id.* at 449.

The "basic rationale [for the ripeness doctrine] is to prevent the courts, through avoidance of premature adjudication, from

entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbot Laboratories* v. *Gardner*, 387 U.S. 136, 148-49 (1967). In the instant case, by accepting the plaintiffs' suit before the FERC had sought judicial enforcement of its subpoenas the court interfered with an ongoing investigation which it acknowledged was within the FERC's authority to conduct even if all of the plaintiffs' business activities were intrastate. The district court forced the FERC to defend its power to act and to reveal at least some of the purposes of its investigation; it then held that the subpoenas were invalid because they were overbroad and were unreasonably disrupting the business operations of the companies. The companies had a simple solution to the disruption if they reasonably believed the FERC was attempting to examine documents that they had a legal right to withhold; that was to refuse permission to make the examination. The FERC then would be faced with a choice whether it had enough information without further investigation, whether it should pursue its investigation in some different manner, or whether to go to court to seek judicial enforcement of the subpoenas as they were written or in some different form. The choice would be the agency's, and until it made a decision to seek judicial enforcement plaintiffs' business activities would not be affected. In fact, the agency might decide not to enforce the subpoenas, thus no court decision would ever be necessary.

The facts of the present case are strikingly similar to those in *Reisman* v. *Caplin*, 375 U.S. at 440. The statutory procedure under consideration in *Reisman* was virtually identical to the procedure authorizing enforcement of the FERC subpoena. The plaintiffs in *Reisman*, as in the case before us, argued that refusing the comply with the Commissioner's subpoena and awaiting judicial enforcement exposed plaintiff to severe penalties. The

Supreme Court dismissed this claim, reasoning that "noncompliance is not subject to prosecution . . . when the [summons] is attacked in good faith." *Id.* at 447. Similarly, if plaintiffs' defense to the FERC's subpoenas has merit, they will not be exposed to civil fines. Therefore, we hold that the target companies, like the plaintiff in *Reisman*, possessed an adequate legal remedy and were not exposed to the type of immediate, irreparable injury necessary to justify jurisdiction. *Accord Atlantic Richfield Co.* v. *FTC*, 546 F.2d 646, 649 (5th Cir. 1977).[3]

The district court ruled that in effect the FERC counterclaimed for the enforcement of the subpoenas. But in *Servitron, Inc.* v. *ICC*, 380 F. Supp. 1344, 1346 (M.D. La. 1974), *aff'd mem.*, 420 U.S. 999 (1975), and *Comet Electronics, Inc.* v. *United States*, 381 F. Supp. 1233, 1237 (W.D. Mo. 1974), *aff'd mem.*, 420 U.S. 999 (1975), relied upon by plaintiffs, the Interstate Commerce Commission specifically counterclaimed for judicial enforcement of the subpoenas, thereby creating an independent jurisdictional ground for the district court and permitting a full hearing on the merits. In the instant case, neither the United States nor the FERC did that; rather, on many occasions throughout the proceeding they objected to the court's exercise of jurisdiction. We do not consider their opposition to the district court's taking jurisdiction of plaintiffs' case to be the equivalent of a counterclaim for enforcement.

The case is remanded to the district court with instructions to dismiss the action for lack of subject matter jurisdiction.

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[3] The district court, after quashing the FERC subpoenas, essentially agreed in dictum that the plaintiffs here acted prematurely. "Claims that the Commission [FERC] has no authority to regulate the actions of the Plaintiffs are premature at this stage. The Commission has made no such determination and Plaintiffs are not aggrieved by the mere potential that some action might be taken by FERC." R. II, 339.

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

BELLE FOURCHE PIPELINE COMPANY, BLACK HILLS TRUCKING, INC., EQUITABLE OIL PURCHASING COMPANY, EIGHTY-EIGHT OIL COMPANY, J. FRANK POTTORFF, and H.A. TRUE, JR.,
Plaintiffs,

vs.

THE UNITED STATES OF AMERICA, and THE FEDERAL ENERGY REGULATORY COMMISSION,
Defendants.

No. C82-0145-B

MEMORANDUM OPINION

BRIMMER, District Judge

Decided January 20, 1983

This case is an effort by the Plaintiffs to halt an administrative investigation by the Federal Energy Regulatory Commission (FERC) of an alleged intrastate business, after several weeks of review of Plaintiffs' files by a team of FERC's lawyers, accountants and clerks who photocopied more than 13,000 documents in the process of which they nearly stopped the Plaintiffs' work. FERC subpoenaed what is asserted to be virtually all of Plaintiffs' records and documents in their possession for the last five years. FERC also subpoenaed, independently, the records of most of the Plaintiffs' customers, which Plaintiffs assert will detrimentally affect their businesses. The Plaintiffs contend that their oil pipeline operations are conducted within the State of Wyoming and are therefore intrastate commerce subject to the regulation of the Wyoming Public Service Commission, and that they are not subject to regulation by FERC under the powers delegated to it by the Department of Energy Organization Act

to regulate transportation of oil by pipeline; , 42 U.S.C. Section 7172(b).

The Plaintiffs seek a declaratory judgment and ask the Court to use its equitable powers of restraint to halt further investigation. Jurisdiction is now claimed on the ground that a case or controversy exists between the Plaintiffs and FERC over whether or not they are subject to federal regulation under the interstate commerce clause of the Constitution, which controversy comes under the jurisdictional grant of 28 U.S.C. Section 2201 relating to declaratory judgments.

The Plaintiffs are Belle Fourche Pipeline Company (Belle Fourche), which operates a crude oil pipeline as a gathering system that is wholly in Wyoming; Black Hills Trucking, Inc. (BHT), a Wyoming corporation, which operates common carrier tank trucks that transport oil from producing Wyoming wells to receiving points in the Belle Fourche pipeline system in Wyoming; Equitable Oil Purchasing Company (Equitable), a Wyoming corporation, which operates a "gravity bank" in Casper, Wyoming, designed to compensate shippers of Wyoming oil for increases or decreases in the value of their crude oil due to changes in gravity of their oil resulting from commingling of the oil in a common stream; Eighty-Eight Oil Company, a partnership, which purchases and sells crude oil and ships 60% to 70% of the total volume of oil that is transported in Wyoming by Belle Fourche; and two individuals, J. Frank Pottorff and H.A. True, Jr., officials of the Plaintiffs.

The Defendants, the United States and FERC, moved to dismiss the Plaintiffs' Complaint on the grounds that: (1) The Court has no jurisdiction because Plaintiffs' claims are not ripe for review; (2) Judicial review of such agency action is vested in the Court of Appeals; (3) The Plaintiffs have an adequate remedy at law by refusing to obey the FERC subpoenas; and (4) The subpoenas are within the scope of FERC's statutory authority.

The Plaintiffs sought a temporary restraining order to preserve the status quo and moved for a preliminary injunction. At the evidentiary hearing on the preliminary injunction, the Court consolidated the matter for a hearing on the merits, without objection by the parties, under Rule 65(a)(2), F.R.C.P. Thus, this matter has been fully heard on its merits and is ready for final disposition.

The issues raised by the parties in their briefs are:

(1) Whether or not this Court has jurisdiction of this matter?

(2) Whether or not the Plaintiffs' activities are intrastate in character so that FERC has no regulatory jurisdiction?

(3) Whether or not the subpoenas issued by FERC in its "private investigation" are within the scope of its investigating authority?

The threshold question is whether this Court has subject matter jurisdiction in this case. The Plaintiffs initially pled jurisdiction under the Department of Energy Organization Act (DOEOA), 42 U.S.C. Section 7192, under the Administrative Procedure Act, and under the Declaratory Judgment Act. By Order dated August 18, 1982, this Court held that jurisdiction did not exist under the Plaintiffs' alleged jurisdictional statutes. In assessing the potential jurisdiction under the DOEOA, this Court examined the Interstate Commerce Act only insofar as it expressly granted jurisdiction to the Court of Appeals to review final agency action and reached the conclusion that jurisdiction in this Court did not exist under 42 U.S.C. Section 7192(a) or Section 7192(b). That conclusion remains unaltered.

Plaintiffs have now amended their complaint to include substantive jurisdictional bases not contained in their original pleadings. They alleged subject matter jurisdiction based upon 28 U.S.C. 1331, which provides in relevant part, that "The district courts shall have original jurisdiction of all civil actions wherein

the matter in controversy . . . arises under the Constitution, laws or treaties of the United States," and 28 U.S.C. 1337, which provides in relevant part that "the district courts shall have original jurisdiction of any civil action or proceeding arising under Act of Congress regulating commerce . . . " FERC concedes that the Interstate Commerce Act is an "Act of Congress regulating commerce." In fact, in the FERC staff report handed to the Court at the trial (Court Exhibit I filed concurrently herewith as a sealed document), its staff claims jurisdiction to make a "formal private investigation" under the Interstate Commerce Act.

The test for determing whether a claim "arises under" federal law is the same for both Sections 1331 and 1337. *First National Bank of Aberdeen National Bank,* 627 F.2d 843, 849 n. 14 (8th Cir. 1980); *Carlson* v. *Coca-Cola Co.,* 483 F.2d 279, 280 n. 1 (9th Cir. 1973); *McFaddin Express, Inc.* v. *Adley Corp.,* 346 F.2d 424, 426 (2nd Cir. 1965), cert. den. 382 U.S. 1026 (1965). That test has been stated by the Tenth Circuit Court of Appeals as follows:

"A case 'arises' under the laws of the United if it clearly and substantially involves a dispute or controversy respecting the validity, construction or effect of such laws which is determinative of the resulting judgment." *Mountain Fuel Supply Co.* v. *Johnson,* 586 F.2d 1375, 1381 (1978).

In the instant action, the Plaintiffs contend that the subpoenas issued by FERC, which precipitated the Plaintiffs' action, were not within the scope of the agency's authority of jurisdiction under 49 U.S.C. 12 and 13 (now 49 U.S.C. 11701 and 10321). In order to properly examine the validity of the Plaintiffs' claims, it is imperative that the above federal statutes be construed to determine whether the Commission has the power and authority to conduct the type and breadth of investigation it has undertaken in regard to the Plaintiffs.

Specifically, this Court has been asked to make a determination as to whether the Plaintiffs' businesses are intrastate or interstate in character. Such a determination requires a construction, interpretation, and application of Section 1 of the Interstate Commerce Act. This Court has jurisdiction pursuant to 28 U.S.C. 1337 because "federal jurisdiction under the Interstate Commerce Act exists [under Section 1337] where the remedy sought is inferable from the Act or hinges on an interpretation of it." Ashley, Drew, and Northern Railway v. United Transportation Union, 625 F.2d 1357, 1369 (8th Cir. 1980), citing *Garret* v. *Times-D.C., Inc.*, 520 F.2d 627, 629 (9th Cir. 1974).

Other courts have found it equally necessary to construe provisions of the Interstate Commerce Act in order to determine the validity of subpoenas issued by the Interstate Commerce Commission. *Servitron Inc.* v. *ICC*, 380 F. Supp. 1344 (M.D. La 1974), 420 U.S. 999; *Comet Electronics, Inc.* vs. *U.S.*, 381 F. Supp. 1233 (W.D. Missouri 1974), 420 U.S. 999. Both of those cases involved suits by plaintiffs, who were not under investigation themselves but who did business with the company under investigation, to declare that the Commission did not have authority to subpoena them and that the subpoenas in question were too broad. The court in *NLRB* v. *British Auto Parts, Inc.*, 266 F. Supp. 368 (C.D. Cal. 1967) held that 28 U.S.C. 1337 vested the district courts with jurisdiction to determine the validity of administrative subpoenas in order that the courts might "aid administrative agencies in carrying out their congressionally authorized powers and duties, despite the absence of any express grant of district court jurisdiction under the agencies' respective enabling acts". *Id.* at 374. District courts have also found subject matter jurisdiction under Sections 1331 and 1337 in actions which involved challenges to administrative actions in contests similar to the present case. In *A.O. Smith Corporation* v. *FTC*, 396 F. Supp. 1108 (D.Del. 1975), the agency requested

that the Plaintiff file certain business reports. In a pre-enforcement action brought by one of the businesses affected, asserting the lack of statutory authority of the agency to require this data, and alleging that an undue burden was involved in providing the information requested, the Court found the matter both ripe for judicial review and within the subject matter jurisdiction of both Sections 1331 and 1337, since the Commission's actions were taken under its claimed authority of the Federal Trade Commission Act. See also Smith v. Federal Trade Commission, 417 F. Supp. 1068 (D.Del. 1976). Defendants herein have taken similar action in issuing subpoenas under the alleged authority of the Interstate Commerce Act, and jurisdiction is therefore proper in this Court.

Clearly, the authorities hold that if the resolution of the Plaintiffs' claim requires an interpretation of the Interstate Commerce Act, then the Plaintiff has raised a federal question over which the Court should correctly invoke jurisdiciton. *Ashley, Drew, and Northern Railway* v. *United Transportation Union,* supra. Plaintiffs here have done exactly that, and jurisdiction is vested under both Section 1331 and Section 1337.

The district court is a proper forum in which to hear the dispute involved in the instant action. On January 19, 1982, FERC served four subpoenas upon Plaintiffs, requiring the production of what Plaintiffs claim are all of their records and documents in Washington, D.C. FERC's team of lawyers, accountants and clerks were invited to Plaintiffs' offices in Casper, Wyoming, where they photocopied approximately 13,000 documents and then the Plaintiffs stopped the investigation because it was disrupting their business and they felt that the documents produced had established the intrastate nature of their businesses. The Commission has instituted no formal proceedings to enforce the subpoenas, in which the Plaintiffs could be heard, and consequently there will be no final agency action which could be the subject of appeal to the circuit court. The four subpoenas served

on Plaintiffs are only part of the problem, for FERC has also served subpoenas duces tecum on most of Belle Fourche's shippers over the Wyoming system. Mere refusal by Plaintiffs to comply with their subpoenas and a subsequent enforcement action wouldn't affect the other shippers. It is therefore important, assuming arguendo that Plaintiffs are in fact not in intrastate commerce, that rights asserted by Plaintiffs be adjudicated at this stage of the Commission's investigation, because to oblige Plaintiffs to wait to raise the issue of FERC's right to investigate until after the investigation is complete and the agency undertakes formal, final action does not adequately protect the Plaintiffs. No adequate remedy would be available at that point. They should have some forum in which they can have their day in court. When there is no other adequate administrative or judicial remedy, the district court may exercise jurisdiction to enforce important rights which have been infringed by acts of a federal administrative agency in excess of the agency's authority. *Leedom* v. *Kyne*, 358 U.S. 184 (1958), *Deering Milliken, Inc.* v. *Johnston*, 295 F.2d 856 (4th Cir. 1961); *Izaak Walton League of America* v. *Schlesinger*, 337 F. Supp. 387 (D.C.D.C. 1971).

28 U.S.C. Sections 2321 and 2342 grant original jurisdiction in the Courts of Appeal only for matters which amount to challenges of final agency action. Cases which arise under the legislative acts recited in these Sections but which have not yet resulted in final agency action in the form of a rule, regulation, or order cannot be reviewed in the Court of Appeals, but may be reviewed in the district court. *Citizens for a Safe Environment* v. *Atomic Energy Commission*, 489 F.2d 1018 (3rd Cir. 1974).

The Third Circuit Court of Appeals in *Union National Bank of Pittsburgh* v. *I.C.C.*, 569 F.2d 742, 745 (3rd Cir. 1977) also recognized the ability of a district court to exercise jurisdiction over disputes about agency practices which have not resulted in 'final agency action' necessary for review in the courts of appeal.

> "The court of appeals had exclusive jurisdiction to review only "rules, regulations or final orders of the Interstate Commerce Commission" 28 U.S.C. 2342(5). If an order or other agency action is not final — and if it is not a rule or regulation — it is not reviewable in the court of appeals in the first instance. (Citation omitted.) It may of course be reviewable in the district courts pursuant to other jurisdictional statutes" (citing 28 U.S.C. 1337).

"Statutory provisions concerning review of agency action by the Courts of Appeals do not in and of themselves . . . preclude District Court jurisdiction." *Elmo Division of Drive-X Co.* v. *Dixon,* 348 F.2d 342, 343 (D.C. Cir. 1965). Plaintiffs herein have demonstrated that they are likely to suffer continuing harms as a result of agency action alleged to be beyond the scope of the agency's authority. The actions complained of are not final agency actions subject to review in the court of appeals, but may be appropriately reviewed within this Court's jurisdiction. *Elmo Division of Drive-X* v. *Dixon,* supra.

In addition to alleging jurisdiction under Section 1337, the Plaintiffs have included claims in their amended complaint that the actions of FERC violate Plaintiffs' due process rights. This gives rise to jurisdiction under 28 U.S.C. 1331, since the allegations raise a question under the Fourth Amendment. The substance of the Plaintiffs' claims are that FERC has engaged in a course of action which contravenes the Fourth Amendment's prohibition against unreasonable search and seizure. It cannot be doubted that administrative subpoenas are subject to the constraints of the Fourth Amendment.

> "It is now settled that, when an administrative agency subpoenas corporate books or records, the Fourth Amendment requires that the subpoena be sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome. The agency has the right to conduct all reasonable inspections of such documents which are contemplated by statute, but it must delimit the confines of a search by designating the needed

> documents in a formal subpoena. In addition, while the demand to inspect may be issued by the agency, in the form of an administrative subpoena, it may not be made and enforced by the inspector in the field, and the subpoenaed party may obtain judicial review of the reasonableness of the demand prior to suffering penalties for refusing to comply." *See* v. *Seattle*, 287 U.S. 541, 544-5 (1967).

The Commission has repeatedly argued that the Plaintiffs' method of contesting the validity of the subpoena is not proper, asserting that the Plaintiffs' claims are not ripe for review and that the correct procedure is for the Plaintiffs to refuse compliance with the subpoena and for the agency to bring an enforcement action. It is argued that the Plaintiffs may assert their rights only after the agency has sought judicial enforcement. Such an argument elevates form over substance. The Plaintiffs contend that the subpoenas are invalid. Defendant alleges that the subpoenas are valid, and it wishes to continue its private, secret investigation. Although it has not formally counterclaimed for enforcement, that is the result it seeks, else it would not be contesting Plaintiffs' claims so vigorously. In other actions where the party subpoenaed has been the first to bring suit, and the agency by counterclaim has sought enforcement of the subpoena, the courts have found jurisdiction. *Comet Electronics, Inc.* v. *U.S.*, supra; *Servitron, Inc.* v. *I.C.C.*, supra. To find a difference in this case, merely because FERC has done all it can to enforce its subpoenas except make a formal request of this Court to do so, would make us slavish adherents of form over substance.

FERC asserts that only the Court of Appeals has exclusive jurisdiction of a matter such as this. As heretofore noted, that is only to review a final agency order. The Plaintiffs couldn't ever get their present complaint to the Court of Appeals at this stage of the proceedings. Yet, if there is any merit at all to their position, they ought to have a forum in which they can be heard. To urge that they have an adequate remedy by refusing compliance

and forcing FERC to bring an enforcement action is just another way of denying them a forum without giving them a chance to be heard. Their remedy is not adequate because FERC has also subpoenaed the other shippers' records and an enforcement action between these plaintiffs and FERC would not affect those subpoenas. In summary, Plaintiffs' amended complaint contains substantial allegations sufficient to give rise to jurisdiction under Section 1337 due to the necessity of construing the Interstate Commerce Act. It further alleges facts concerning rights under the Fourth and Fifth Amendments, as well as the I.C.A., sufficient to give rise to jurisdiction under Section 1331. Finally, the agency has in effect asked this Court to enforce the subpoenas, by not enjoining its investigation, and thus jurisdiction is conferred by the Interstate Commerce Act's explicit provisions. For these reasons, the Court concludes that it has jurisdiction.

The next issue to be decided is that of whether or not the Plaintiffs' activities are intrastate in character, so that FERC is without authority to regulate them or to investigate them. The evidence is undisputed that:

> (1) The Belle Fourche Pipeline Company operates its Wyoming System entirely within the State of Wyoming. It is a separate non-connected pipeline system from its Montana-North Dakota System and its Silvertip System (from Wyoming to Montana) which are both interstate in character, and is regulated by the Wyoming Public Service Commission as an intrastate common carrier. The Wyoming System receives oil from the Powder River Basin area of Wyoming and transports it to receiving tanks, owned by the receiving carrier, which at Fiddler Creek are connected with the WYCO Pipeline, and with the Butte Pipeline at Osage, and the Continental and Platte pipeline at Glenrock and Guernsey, and the Amoco pipeline system at Fort Laramie. From such tankage terminals, shippers can move the oil to refineries in four Wyoming cities with a refining capacity of 100,000 barrels, which is more than the capacity of the Belle Fourche line; but from them the oil can also be shipped on, out of the State. Belle Fourche doesn't buy

any of the oil that it transports. While Belle Fourche has filed duplicate tariffs with FERC covering the Wyoming system, such tariffs do not provide for joint or "through" oil movements and these are "local" in nature. Belle Fourche since 1976 has made no interstate oil shipments over the Wyoming system.

(2) Black Hills Trucking operates tank trucks that transport oil from producing wells to the Belle Fourche Pipeline. Although regulated by the Wyoming Public Service Commission and the ICC, such trucking activities occur wholly within the State and are intrastate in nature.

(3) Equitable Oil Purchasing Company operates a "gravity bank" in Wyoming, for the purpose of compensating shippers for increases or decreases in the value of their crude oil resulting from commingling of oil in the pipeline's common stream. While shippers are not required to participate in the gravity bank, if they do not do so their oil must not be commingled or it cannot be shipped if it is not compatible with other shipper's oil. Such activities are conducted in Casper, Wyoming, relate to intrastate oil movements and are intrastate in character.

(4) Eighty-Eight Oil Company purchases and sells 60% to 70% of the oil transported over the Wyoming System. The oil is bought and sold by "in-line transfers" while it moves in the pipeline, there being an average of three transfers for each barrel. As a result of such transfers, the shippers at the time of initial shipments do not know their final destinations. The oil may also be held within the Wyoming System as a line balance of the shipper, which is available for future delivery on order of the shippers.

In its opinion in *Northville Dock Pipe Line Corp.* and *Consolidated Petroleum Terminal, Inc.*, issued February 6, 1981, No. 111, Docket No. OR78-5, 22 F.P.S. 5-183, the Defendant, Federal Energy Regulatory Commission, quoted the following statement of the Interstate Commerce Commission from *Transportation of Petroleum and Petroleum Products by Motor Carriers Within a Single State*, 71 M.C.C. 17 (1957), as setting

forth the correct criteria for determination of whether a transportation activity is intrastate:

> "(1) At the time of shipment there is no specific order being filled for a specific quantity of a given product to be moved through to a specific destination beyond the terminal storage, (2) the terminal storage is a distribution point or local marketing facility from which specific amounts of the product are sold or allocated, and (3) transportation in the furtherance of this distribution within the single state is specifically arranged only after sale or allocation from storage. These things, it is believed, are basically sufficient to establish that the continuity of transportation has been broken, that the initial shipments have come to rest, and that the interstate journey has ceased."

The Defendant held in *Northville*, on the basis of this authority, that even though oil was transported in interstate commerce to an in-state pipeline system and thereafter within a single state, the pipeline operation was intrastate. In *Jet fuel by Pipeline Within the State of Idaho*, 311 I.C.C. 439 (Div 2, 1964), the Interstate Commerce Commission there held, where an oil pipeline wholly within the State of Idaho connected to an interstate pipeline that ran from Salt Lake City to Idaho and on to Washington, that the ICC lacked jurisdiction over the intrastate shipments of jet fuel in Idaho. Similarly, in *United States Department of Defense* v. *Interstate Storage and Pipeline Corp.*, 353 I.C.C. 397, the I.C.C., in addressing the issue of whether the movement of petroleum within a single state but preceded by interstate barge transportation was in fact in interstate commerce, said:

> ". . . In determing whether a carrier or carriers are engaged in interstate commerce, the Commission must determine the essential character of the commerce. *One of the most important factors in determing the essential character is the fixed and persisting intent of the shipper, or the one for whose benefit the shipment is made* . . . (Citations omitted.) . . . Other factors to be considered are the character of the billing, that is, whether it is local or through, *change of*

> *ownership during the course of transportation, knowledge or lack of it on the part of the consignor of the ultimate destination or consignees,* the character and length of the transaction taking place at the point of interruption, *the intent on the part of the consignor with reference to the final destination,* breaking of bulk and *commingling of the commodity* shipped with other shipments of the same commodity, *power of the owner of the property to divert the shipment after the initial movement has begun,* and the general practices and customs prevailing in a particular industry or trade. No single factor is necessarily to be regarded as determinative in the final conclusion as to the essential character of the traffic. *Thomas Keery Co., Inc.* v. *New York, O. W. Ry. Co.*, 206 I.C.C. 585, 588-589 (1935).

This same view was adopted by the Ninth Circuit in *Southern Pacific Transportation Co.* v. *I.C.C.*, 565 F.2d 615 (1977), where it was held that shipments from canning plants in San Jose, California to a warehouse in Stockton, California, where the goods were stored before interstate or foreign movement, were in intrastate commence and outside the regulating jurisdiction of the Interstate Commerce Commission, which has ordered the petitioners to desist from engaging in or contracting for certain trucking operations. The Court said:

> "As the Commission correctly states in its opinion,
>
> 'Whether transportation is interstate or intrastate is determined by the essential character of the commerce, *manifested by shipper's fixed and persisting transportation intent at the time of the shipment,* and is ascertained from all of the facts and circumstances surrounding the transportation." (120 M.C.C. at 242, Emphasis added).
>
> "The record establishes that the only intent manifested by the shipper in this case at the time of shipment (i.e., shipment from the canning plants) was to ship the goods to the warehouse for eventual transshipment to an as yet unknown destination — interstate, intrastate or foreign — and to assure their eligibility for transit credits which were available regardless of whether the ultimate transshipment was interstate, intrastate or foreign . . . .

> "It is not disputed that Del Monte, under the options available to it in the transit tariffs, did not decide the final destination of any shipment of goods until after the goods had come to rest in the Stockton warehouse. *The fact that most of the goods in the warehouse were eventually shipped to interstate or foreign destinations is not sufficient to give rise to fixed intent to engage in an interstate movement at the time the goods left the canning plants with their final destination still unknown.* Inasmuch as the goods remained under Del Monte's control at the Stockton warehouse and were not committed to a common carrier for an interstate of foreign movement until they left that warehouse, the requisite intent which governs the character of the movement was not formed until shipment from Stockton." (Emphasis added.)

Except for the fact that FERC here is conducting a "private" investigation where in *Southern Pacific Transp. Co.* v. *I.C.C.*, supra, there had issued a cease and desist order, the instant case is substantially on all fours with the latter. The shippers here do not know the destination of the oil at the time of shipment; it may ultimately reach an in-state refinery or may, after storage at the end of the Belle Fourche pipeline, be sent on out of state, but the oil is billed only to a destination or delivery point within Wyoming, where it comes to rest in storage prior to interstate transportation. At the time that the Plaintiffs take any actions with respect to the oil, it is not in interstate commerce, for its interstate journey, if any, has not begun. The oil is transported at rates established by "local" tariffs, rather than tariffs for "through" movements with another pipeline, and those are rates filed and approved by the Wyoming Public Service Commission. Belle Fourche has filed duplicate tariffs with FERC, so that interstate shippers may use those rates in transporting oil over the Wyoming system. The Wyoming Public Service Commission has characterized the Belle Fourche system as "substantially a local gathering and feeding operation" preliminary to interstate trunk line transportation. *Belle Fourche Pipeline Co.* v. *Butte*

Pipeline Co., 51 P.U.R.3d 189 (Wyo. P.S.C., 1963). We agree and so find.

The activities of Black Hills Trucking and Equitable Oil Company are likewise intrastate in character. It is, of course, possible that Eighty-Eight Oil Company may own oil in the Wyoming pipeline system which is certainly shipped by it over a connecting interstate pipeline in interstate commerce. But, the evidence before the Court does not show that; it shows only that Eighty-Eight buys and sells 60% to 70% of the oil in the line but that such oil has no known destination at the time of shipment beyond the ends of the Wyoming Belle Fourche system. Under the aforementioned tests of the interstate commerce quality of its commerce, we must hold that the activities of Eighty-Eight Oil Company, to which proof has been offered, are also intrastate in nature.

This brings us to the principal issue of this case: Whether or not the investigatory power of FERC permits it to investigate an intrastate activity and copy all of the records amassed by it over a 5-year period?

FERC cannot confer power upon itself. Its subpoenas must be issued in furtherance of an authorized statutory objective. 5 U.S.C. 555(c) provides that:

> "Process, requirement of a report, inspection, or other investigative act or demand may not be issued, made, or enforced except as authorized by law."

The Plaintiffs could have ignored the command to produce if FERC's investigation is not expressly or impliedly authorized by statute — a point that FERC concedes. But, they seek here a broader remedy, that of judicial suppression of the entire private investigation of FERC, in order to protect their shippers whose records are also subpoenaed, on the ground that these activities are intrastate.

Under Section 1 of the Interstate Commerce Act it is stated that the act shall apply to common carriers engaged in the "transportation of oil or other commodity . . . by pipeline . . . from one State or territory of the United States . . . to any other State or territory of the United States . . .," and it states that it shall *not* apply "To the transportation of . . . property . . . wholly within one State . . . ." 49 U.S.C. Section 1. This authority has been conferred upon the Defendant FERC by 421 U.S.C. Sections 7155 and 7172(b). Sections 12, 13 and 20 of 49 U.S.C. provide the statutory authority for the investigatory power of the I.C.C. and now FERC by granting "authority . . . to inquire into and report on the management of the business of all common carriers subject to the provisions of this chapter . . .," 49 U.S.C. Section 12; and, "Whenever in any such investigation the Commission . . . finds that any such rate, fare, charge, classification, regulation or practice causes any undue or unreasonable, or unjust discrimination against, or undue burden on interstate or foreign commerce . . ., it shall prescribe the rate . . . to be charged, and the classification regulation or practice thereafter to be observed . . ." 42 U.S.C Section 13(4), and 42 U.S.C. Section 20 grants authority to require from carriers reports and to inspect accounts, records and memoranda.

Initially, in the development of administrative law "fishing expeditions into private papers" were denounced by no less than Mr. Justice Holmes in *Federal Trade Commission* v. *American Tobacco Co.*, 264 U.S. 298, 305 (1924), who said that only the most explicit language would lead him to believe that Congress "intended to authorize one of it subordinate agencies to sweep all our traditions into the fire and to direct fishing expeditions into private papers on the possibility that they may disclose evidence of crime." The Plaintiffs have relied on this authority, but unfortunately for them it is no longer the law. In the words of Prof. Kenneth Culp Davis, in his *Administrative Law Text*, p. 53, summarizing the change:

> During the decade of the 1940's, constitutional principles concerning the administrative power of investigation were largely turned right around backwards. The change occurred not only in the federal courts but also in most of the state courts. A new set of principles was established, built on the basic idea that the administrative power of investigation must be fully effective. As regulation has expanded and intensified, the administrative quest for facts and more facts has gained momentum and has seemingly become an irresistible force. This force has collided with what at first were apparently immovable constitutional principles concerning privacy, searches and seizures, self-incrimination, and freedom from bureaucratic snooping. The constitutional principles remained firm for a time but gradually weakened and crumbled. The force proved irrestible. Remnants of the constitutional principles are left standing, but only to an extent clearly consistent with permitting administrative agencies freely to secure factual materials needed to carry out the programs they administer.

See also Davis, The Administrative Power of Investigation, 56 Yale Law Journal 1111; Note, 58 Georgetown Law Journal 345; Note, 44 Chicago-Kent Law Review 50.

In *Endicott Johnson Corp.* v. *Perkins*, 327 U.S. 501 (1943), the Court held that in an enforcement proceeding an agency was not first required to demonstrate that the information sought by its subpoena was competent or relevant to any lawful purpose of the Secretary of Labor. The agency was not required to prove that the information demanded tended to prove a violation of the substantive act administered by it. The conduct of investigation was thus left up to the Secretary. The Court held that jurisdiction to conduct an investigation exists if the inquiry is of the general kind the official is authorized to make.

Thereafter, in *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186 (1946), where the Wage and Hour Administrator had subpoenaed records of the payroll as well as the sources of the advertising and news of a newspaper publishing company, which claimed to be in intrastate commerce, the Supreme Court

held that the Administrator was empowered by statute to investigate to discover and procure evidence, as long as the subpoena was not too indefinite or too broad, and that the inquiry was authorized by law and the materials were relevant. The Court held that the requirements of the Fourth Amendment are met if the investigation be "for a lawfully authorized purpose within the power of Congress to command."

Finally, any doubt as to whether it is permissible for an agency to engage in fishing expeditions, seeking evidence of both violations and agency jurisdiction over the alleged violators, was put to rest by the Supreme Court in *U.S.* v. *Morton Salt*, 338 US 632 (1950). In that case the FTC sought to require certain corporations to file reports demonstrating how they had complied with a court decree enforcing a Commission cease and desist order. The plaintiff contested the requirement of a report, asserting, in part, that the Fourth and Fifth Amendments prohibited such an intrusion. The Supreme Court, however, recognized the broad investigatory powers conferred upon federal agencies to carry out their statutory duties, in holding that "[e]ven if one were to regard the request for information in this case as caused by nothing more than official curiosity, nevertheless law-enforcing agencies have a legitimate right to satisfy themselves that corporate behavior is consistent with the law and the public interest." See also *U.S.* v. *Powell*, 379 US 48 (1964); *S.E.C.* v. *Brigadoon Scotch Distributing Co.*, 480 F.2d 1047 (2nd Cir. 1973).

The broad authority to investigate potential wrong-doings extends beyond the mere scope of an agency's regulatory authority. In order to conduct an investigation an agency may properly seek information from parties not ordinarily subject to the agency's jurisdiction. Precisely this issue was raised and decided in *Comet Electronics, Inc.* v. *U.S.*, 381 F.Supp. 1233, affd. 420 U.S. 999 (1975), and *Servitron, Inc.* v. *ICC*, 380 F. Supp. 1344, affd. 420 U.S. 999 (1975). Those cases both involved challenges

to ICC subpoenas issued in conjunction with an investigation of two rail carriers. Plaintiffs in each case were persons or companies who had done business with the carriers, and whose records were subpoenaed by the ICC. The Court in each case was asked to interpret the scope of the agency's investigatory powers under the same statute in question here, 49 *U.S.C.* Section 12(1). That statute, in pertinent part, reads as follows:

> [For] the purpose of this chapter the Commission shall have power to require, by subpoena, the attenance and testimony of witnesses and the production of all books, papers, tariffs, contracts, agreements, and documents relating to any matter under investigation.

The plaintiffs therein argued that the above language referred only to common carriers subject to ICC jurisdiction, and that the ICC could not subpoena materials from an outside party. In rejecting this position, the *Comet* court stated:

> Plaintiffs' construction is an unreasonably narrow interpretation of the broad statutory mandate given the Commission by Congress. The plain language of Section 12(1) states that the Commission has the "power to require, by subpoena, the attendance and testimony of witnesses." There is no restriction concerning what witnesses may be called other than that their testimony must related to "matters under investigation."
>
> . . .
>
> We must further conclude that the language of the statute must be read as written and that the Commission's authority to subpoena witnesses extends to persons not named as parties to an ICC investigation but who nevertheless may be able to give testimony *or produce documents* which may be relevant to a proper Commission investigation. *Comet Electronics*, supra, at 1238-1239.

Similarly, in *Servitron*, the District Court found that:

> [W]hat the statute really does is to permit the Interstate Commerce Commission to investigate, by obtaining testimony and other evidence which is germane to their investigation.
>
> . . .
>
> This does not mean that the Interstate Commerce Commission has the unlimited authority to delve into the business affairs of a person or company not under investigation . . . . If the things sought by the subpoena do not relate to the plaintiffs' business with the railroads under investigation, then the Commission does not have the right to obtain them. But it does have the right to obtain evidence from anyone whomsoever of things relating to the matter properly under its investigation. (Citing *ICC* v. *Baird*, 194 U.S. 25 (1904); *ICC* v. *Brimson*, 154 U.S. 447 (1894). *Servitron, Inc.* v. *ICC*, supra, at 1347.

In the instant case FERC has initiated an investigation into possible violations of the I.C.A. which would have an impact on interstate commerce. This is clearly the kind of investigation contemplated by Section 12(1). *U.S.* v. *Morton Salt*, supra. An examination of matters concerning intrastate commerce is proper if the Commission is attempting to pursue its mandate to regulate interstate commerce, because even purely local activities may have an effect on interstate commerce. *Heart of Atlanta Motel* v. *U.S.*, 379 U.S. 241 (1964). Even though no complaint has been issued as a result of this investigation, the Commission may properly examine relevant material to determine whether a complaint or charge should or could be brought at al. "In the pre-complaint stage, an investigating agency is under no obligation to propound a narrowly focused theory of a possible future case." *F.T.C.* v. *Texaco, Inc.*, 555 F.2d 862, 874 (D.C. Cir. 1977), cert. den., 431 U.S. 974 (1977). It is not the district court's job to forecast the probable results of the agency's inquiry and limit it accordingly. This determination is generally left to the agency. *Oklahoma Press* v. *Walling*,

supra; *Endicott Johnson Corp.* v. *Perkins*, supra; *Tobin* v. *Banks Rumbaugh*, 201 F.2d 223 (5th Cir. 1953).

Accordingly, the Court concludes that the Commission may subpoena records of parties such as these which, although their businesses are intrastate in essential character and thus potentially outside the Commission's regulatory powers, relate to matters which are properly subject to investigation by the Commission. *McGarry* v. *S.E.C.*, 147 F.2d 389, 392 (10th Cir. 1945); *Freeman* v. *Brown Brothers Harriman Co.*, 357 F.2d 741 (2d Cir. 1966).

Although the Commission has a general grant of authority to investigate possible violation of law relating to common carriers, its power to subpoena documents is not completely unchecked. The same courts which have conferred expansive investigatory powers upon administrative agencies have also decreed an outer limit to just how far an agency may go. "[T]he disclosure sought shall not be unreasonable." *Oklahoma Press* v. *Walling*, supra, at 208. Sufficient justification for sweeping investigations exists only if "the inquiry is within the authority of the agency, the demand is not too indefinite, and the information sought is reasonably relevant." *U.S.* v. *Morton Salt*, supra, at 652; *S.E.C.* v. *Blackfoot Bituminous, Inc.*, 622 F.2d 512 (10th Cir. 1980).

> "It is now settled that, when ad administrative agency subpoenas corporate books or records, the Fourth Amendment requires that the subpoena be sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome. . . . and the subpoenaed party may obtain judicial review of the reasonableness of the demand prior to suffering penalties for refusing to comply." *See* v. *Seattle*, 387 US 541, 544-5 (1967).

In *U.S.* v. *LaJet, Inc.*, CA 1-81-115 and 1-81-43 (1982) the Temporary Emergency Court of Appeals said: "The role of a reviewing court in a subpoena enforcement proceeding is limited to determining whether the subpoena was issued for a lawfully

authorized purpose, and whether it seeks information relevant to the agency's inquiry."

This Court has already determined that the Commission's investigation is in pursuit of a clearly lawful purpose. The only remaining question is whether the requested documentation is reasonably relevant. "In its consideration of whether the subpoena is relevant to the agency's inquiry, the court will also consider whether it is sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome." *U.S.* v. *LaJet*, supra, at 3.

The party complaining that the subpoena should not be enforced bears the burden of demonstrating the irrelevancy or unreasonableness of the request. *S.E.C.* v. *Blackfoot Bituminous, Inc.*, supra, at 515; *F.T.C.* v. *Standard American, Inc.*, 306 F.2d 231, 235 (3rd Cir. 1962); *Kilgore National Bank* v. *Federal Petroleum Board*, 209 F.2d 557, 560 (5th Cir. 1954). When a respondent shows that the subpoena is irrelevant or burdensome, the district court may modify or deny enforcement of the subpoena. *Goodyear Tire and Rubber Co.* v. *National Labor Relations Board*, 122 F.2d 450 (6th Cir. 1941). Although the inconvenience to Plaintiffs of the subpoena proceeding was somewhat mollified by the Commission's employees coming to the business premises of the Plaintiffs to copy their records, the record also reflects that the presence of Commission investigators severely disrupted the day-to-day operations of the Plaintiffs. FERC has already copied some 13,000 of Plaintiffs' documents and records, and seeks to rifle through virtually all of Plaintiffs' records for the past 5 years. Plaintiffs, originally hoping to cooperate with FERC in providing requested documents, found the undertaking so disruptive that they terminated the invitation to enter their premises and inspect their files, and brought this action. The present subpoenas, such as that to H. A. True, Jr. and Eighty-Eight Oil Company, which is 11 pages, single-spaced, ask for all documents generated by a Plaintiff

company from January 1, 1976 to January 19, 1982, the date of the subpoena, regarding policies, document distribution, accounting procedures, duties of officers and employees, work records of employees, organization charts, code books, all contracts, leases or agreements, virtually all documents "generated during the period January 1, 1963 to the present" relating to its business involving the trucking of oil, all contracts, agreements and correspondence or memoranda from 1976 to the present relating to its sales or exchanges of crude oil, or offers to sell it, its blending of hydrocarbons, and its communications with the other Plaintiffs. If the Court were to try to think of a document that the Plaintiffs might have that is not covered by the subpoenas, it could not do so. These subpoenas require a production of very extensive magnitude, with very little direction or specificity; as such, they do not fall within the requirement of being "reasonably relevant." *U.S.* v. *Morton Salt,* supra. Instead, they are overbroad and "unreasonably burdensome." *See* v. *Seattle,* supra. FERC now has sufficient information regarding the business practices of the Plaintiffs from the 13,000 copies of documents in its possession, and it has spent several days disrupting the Plaintiffs' businesses. It should now analyze and consider that discovery, and then should be capable of formulating specific, relevant subpoena requests which are not unduly burdensome, unlike the present requests. Therefore, this Court will not require the Plaintiffs to comply with these subpoenas at issue in this case.

The Plaintiffs, however, have sought more than a mere declaration that the subpoenas issued to them are invalid. They ask that the entire investigation of the Federal Energy Regulatory Commission be enjoined, and that the subpoenas issued to persons or companies doing business with the Plaintiffs also be declared invalid. While it is within this Court's power to deny enforcement of these subpoenas issued to Plaintiffs, which are overbroad and unreasonably burdensome, this Court cannot

determine that the investigation as a whole should be halted at this stage. As indicated earlier, investigations into potentially unlawful behavior are within the Commission's power. 49 *U.S.C.*12(1); *U.S.* v. *Morton Salt*, supra. Claims that the Commission has no authority to regulate the actions of the Plaintiffs are premature at this stage. The Commission has made no such determination and Plaintiffs are not aggrieved by the mere potential that some action might be taken by FERC. Claims of lack of coverage are not ripe for review at this stage of the administrative process. *Endicott Johnson Corp.* v. *Perkins*, supra.

Plaintiffs also allege as grounds for enjoining the investigation that the Federal Energy Regulatory Commission's Rules Relating to Investigation, 18 *C.F.R.* Part 1b, violate the ICC's own rules, were improperly promulgated, and exceed the agency's statutory authority. Given the broad power of the Commission to conduct investigations, this Court has doubts that the Commission has exceeded its authority in conducting this investigation except by its unusually sweeping subpoenas. However, raising the defense that "star chamber" investigations are without the proper authority of the agency, and thus the respondents need not comply with subpoenas issued in furtherance of the investigation, is premature. "As a general rule, substantive issues which may be raised in defense against an administrative complaint are premature in an enforcement proceeding." *F.T.C.* v. *Texaco, Inc.*, 555 F.2d 862, 879 (D.C. Cir. 1977), cert. den. 431 U.S. 974 (1977). Falling within the realm of substantive defenses which do not bear upon the enforcement proceeding are: claims that collateral estoppel make the investigation invalid (*F.T.C.* v. *Texaco, Inc.*, supra); allegations that the act upon which the investigation is based do not apply to respondents (*Endicott Johnson* v. *Perkins*, supra); suggestions that the agency's investigation is improper because respondents are not within the agency's jurisdiction (*F.M.C.* v. *Port of Seattle*, 521

F.2d 431 (9th Cir. 1975); *S.E.C.* v. *Savage*, 513 F.2d 188 (7th Cir. 1975)). The analysis which this Court should engage in is limited to that described in *See* v. *City of Seattle*, supra. "[I]n holding that an administrative subpoena must be enforced if the information is relevant to a lawful purpose of the agency, and not unduly indefinite or unreasonably burdensome, the Supreme Court has clearly rejected other defenses." *F.T.C.* v. *Texaco*, supra at 879.

Plaintiffs have expressed strong objections to the nature of the investigation being undertaken by FERC. However, they have not presented justification for this Court's termination of a facially valid investigation being carried out pursuant to a statutory mandate of the Interstate Commerce Act and presumably valid regulations. Accordingly, Plaintiffs' prayer for injunctive relief must be denied, except that FERC must be prohibited from pursuing its overbroad present subpoenas against the Plaintiffs and the Plaintiffs must be excused from compliance with them.

Further, this Court does not presently have before it the third-parties sought to be investigated by FERC because they allegedly have information concerning their business relationships with the Plaintiffs, and of course, those parties have not in this proceeding challenged the subpoenas. The plaintiffs herein do not have standing or authority to raise such objections for them. Thus, it would be clearly improper to grant the injunctive relief sought by the Plaintiffs with regard to subpoenas issued by the Federal Energy Regulatory Commission to the third-party shippers which have utilized the facilities of the Plaintiffs.

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

BELLE FOURCHE PIPELINE COMPANY,
BLACK HILLS TRUCKING, INC.,
EQUITABLE OIL PURCHASING COMPANY,
EIGHTY-EIGHT OIL COMPANY,
J. FRANK POTTORFF, and H.A. TRUE, JR.,
Plaintiffs,

vs.

THE UNITED STATES OF AMERICA,
and THE FEDERAL ENERGY REGULATORY
COMMISSION,
Defendants.

No. C82-0145-B

JUDGMENT

This action came on regularly for hearing before the Court on September 13, 1982, being consolidated by the Court for a trial on its merits under Rule 65(a), and the issues having been duly heard, and a decision having been duly rendered, in accordance with the Memorandum Opinion filed herein, incorporating the Findings of Fact and Conclusions of Law of the Court; now, therefore, it is

ORDERED AND ADJUDGED that the Plaintiffs' request for a permanent injunction, enjoining the Defendants from pursuing their investigation, be, and the same hereby is, denied. It is further

ORDERED AND ADJUDGED that the Defendants are hereby permanently enjoined from enforcing the four subpoenas heretofore issued to the Plaintiffs, and at issue in this case, and the Plaintiffs are relieved of any obligation of further compliance with those subpoenas.

Dated this 20th day of January, 1983.

/s/ CLARENCE A. BRIMMER
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

NOVEMBER TERM — December 27, 1984

Before Honorable William J. Holloway, Jr., Honorable Oliver Seth and Honorable James K. Logan, Circuit Judges

BELLE FOURCHE PIPELINE COMPANY;
BLACK HILLS TRUCKING, INC.,
EQUITABLE OIL PURCHASING COMPANY,
EIGHTY-EIGHT OIL COMPANY,
J. FRANK POTTORFF,
and H.A. TRUE, JR.,
Plaintiffs-Appellees,

vs.

UNITED STATES OF AMERICA, and
FEDERAL ENERGY REGULATORY
COMMISSION,
Defendants-Appellants.

Judgment 83-1384
(DC No. C82-145-B)

This cause came on to be heard on the record on appeal from the United States District Court for the District of Wyoming, and was argued by counsel.

Upon consideration whereof, it is ordered that this cause is remanded to the United States District Court for the District of Wyoming with instructions to dismiss the action for lack of subject matter jurisdiction.

/s/ HOWARD K. PHILLIPS

HOWARD K. PHILLIPS, Clerk

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UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JANUARY TERM — February 1, 1985

Before Honorable William J. Holloway, Jr., Honorable Oliver Seth, Honorable James E. Barrett, Honorable Monroe G. McKay, Honorable James K. Logan, and Honorable Stephanie K. Seymour,Circuit Judges

BELLE FOURCHE PIPELINE COMPANY, BLACK HILLS TRUCKING, INC., EQUITABLE OIL PURCHASING COMPANY, EIGHTY-EIGHT OIL COMPANY, J. FRANK POTTORFF, and H.A. TRUE, JR., *Plaintiffs-Appellees,*

vs.

THE UNITED STATES OF AMERICA, and FEDERAL ENERGY REGULATORY COMMISSION, *Defendants-Appellants.*

No. 83-1384

This matter comes on for consideration of appellees' petition for rehearing and suggestion for rehearing en banc in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision sought to be reheard.

The petition for rehearing having been denied by the panel to whom the case was argued and submitted, and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

/s/ HOWARD K. PHILLIPS

HOWARD K. PHILLIPS, Clerk

APPENDIX D

28 U.S.C. § 1331 provides as follows:

> "§ 1331. Federal question
>
> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

28 U.S.C. § 1337(a) provides in pertinent part as follows:

> "§ 1337. Commerce and antitrust regulations; amount in controversy, costs
>
> (a) The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies: *Provided, however,* That the district courts shall have original jurisdiction of an action brought under section 20(11) of part I of the Interstate Commerce Act (49 U.S.C. 20(11) or section 219 of part II of such Act (49 U.S.C. 319), only if the matter in controversy for each receipt or bill of lading exceeds $10,000, exclusive of interest and costs."

Sections 12(1)(a), 12(2), and 12(3) of the Interstate Commerce Act, 49 U.S.C. §§ 12(1)(a), 12(2) and 12(3) provide as follows:

> "(1)(a) The Commission shall have authority, in order to perform the duties and carry out the objects for which it was created, to inquire into and report on the management of the business of all common carriers subject to the provisions of this chapter, *and to inquire into and report on the management of the business of persons controlling, controlled by, or under a common control with, such carriers, to the extent that the business of such persons is related to the management of the business of one or more such carriers,* and the Commission shall keep itself informed as to the manner and method in which the same are conducted. The Commission may obtain from such carriers and persons such information as the Commission deems necessary to carry out the provisions of this chapter; and may transmit to Congress from time to time such recommendations (including recommendations as to additional legislation) as the Commission may deem necessary. The Commission is

authorized and required to execute and enforce the provisions of this chapter; and upon the request of the Commission, it shall be the duty of any United States attorney to whom the Commission may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States all necessary proceedings for the enforcement of the provisions of this chapter and for the punishment of all violations thereof, and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States; and for the purposes of this chapter the Commission shall have power to require, by subpoena, the attendance and testimony of witnesses and the production of all books, papers, tariffs, contracts, agreements, and documents relating to any matter under investigation. [Emphasis supplied]

* * *

(2) Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpoena the Commission, or any party to a proceeding before the Commission, may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of books, papers, and documents under the provisions of this section.

(3) And any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any common carrier subject to the provisions of this chapter, or other person, issue an order requiring such common carrier or other person to appear before said Commission (and produce books and papers if so ordered) and give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof."

APPENDIX E

WYOMING PUBLIC SERVICE COMMISSION

BELLE FOURCHE PIPELINE COMPANY

v.

BUTTE PIPE LINE COMPANY

By the Commission: This is a formal complaint proceeding commenced by complainant (Belle Fourche), under § 37-17, Wyoming Statutes, 1957, and Rule 9, Part I of the commission's rules. The paramount question presented by the pleadings, the evidence, and the briefs in this case, is whether the commission has jurisdiction over the defendant (Butte) in the limited sense that Butte will be in violation of Wyoming law if it proceeds with the construction of a proposed oil pipeline in Wyoming, for the purpose of serving oil fields located in this state now being served by Belle Fourche, unless it first obtains a certificate of public convenience and necessity from the commission authorizing such construction, or stated differently, does the commission have jurisdiction to determine whether the public convenience and necessity require the construction of the proposed facility. By its brief herein, Belle Fourche has acquiesced in Butte's motion to sever this jurisdictional issue for initial decision. Therefore, this opinion will be confined to the question of whether the commission has authority to require Butte to submit to public convenience and necessity regulation.

Belle Fourche is an oil pipeline utility corporation organized under the laws of Wyoming: The company is engaged in the business of serving a number of producing oil fields in the Powder river basin in northeastern Wyoming under certificates of public convenience and necessity issued to it by the commission. Butte is a Delaware corporation operated under contract by Shell Pipe Line Company. The company is engaged principally in the business of transporting crude oil via pipeline from eastern

Montana fields and Belle Fourche's integrated oil pipeline system to major transcontinental pipelines in southeastern Wyoming. Intervenor, Plains Pipe Line Division of Franklin County Coal Corporation (Plains) is a Wyoming corporation. It owns and operates an oil pipeline system serving a number of oil fields in Weston county, Wyoming, under certificates of public convenience and necessity issued to it by the commission. Belle Fourche's system is connected with the system of Plains through the latter's Fiddler Creek station in Weston county, Wyoming.

The complaint of Belle Fourche, in so far as it relates to the jurisdictional question involved herein, alleges in substance that Butte intends to construct and operate an oil pipeline gathering and feeder system in Wyoming, which will substantially duplicate its own, to serve initially five producing oil fields in Campbell county, Wyoming, now being served by complainant, viz.: Raven Creek, Halverson, West Halverson, Timber Creek, and Rozet, without obtaining a certificate of public convenience and necessity from the commission authorizing the construction of its proposed system. The complaint further alleges that the commission has jurisdiction over Butte's proposed construction in Wyoming, and the prayer thereof requests the commission to exercise its jurisdiction in the premises. Butte's answer to the complaint admits that it intends to construct and operate an extension to its pipeline system in Wyoming to serve the above-named oil fields, admits that it is not seeking a certificate of public convenience and necessity from the commission, admits that it is now obtaining rights of way for its proposed pipeline, and affirmatively alleges that it is not amenable to the jurisdiction of the commission under the Wyoming Public Utilities Act as its proposed operations in Wyoming will be those of an interstate oil pipeline carrier operating in an area of interstate commerce which has been pre-empted by the federal government, i.e., the commission lacks jurisdiction and authority to regulate, in any manner, its proposed activities in this state.

The uncontroverted evidence offered by Belle Fourche at the hearing held by the commission in this cause on July 22, 1963, reveals the following facts which we deem pertinent to the question under consideration herein: Belle Fourche was organized in 1957 to provide a pipeline outlet for producers in the Donkey Creek and other nearby fields in Crook county, Wyoming, after Butte and Plains had refused to extend their pipeline facilities to serve these newly discovered fields. The company's first certificated pipeline carried approximately 3,000 barrels of crude oil per day from its Donkey Creek station to storage tanks of Plains at its Fiddler Creek station for delivery to the Sioux Oil Company refinery at Newcastle, Wyoming. As new and adjacent oil fields were discovered in Crook Campbell, and Weston counties in Wyoming, Belle Fourche extended its system under commission authority to serve them. It now serves 16 producing oil fields in these counties, including those which Butte proposes to serve. While the company has expanded its oil pipeline facilities quite rapidly, nevertheless, it has confined and devoted its operations to gathering oil from these rather small fields and feeding the same to other pipeline carriers for further transportation to market centers in Wyoming and other states. In 1961, Belle Fourche established a junction point with Butte at its Osage station in Weston county, Wyoming, and constructed storage tanks there. Belle Fourche has constantly maintained sufficient capacity in its system to transport all oil from the fields it serves, which reserve studies show they will produce in the foreseeable future, including secondary recovery; however, until recently, producers in these fields and shippers of oil therefrom via the Belle Fourche system have had some difficulty in finding capacity in Butte's trunk line south of the Osage station. Belle Fourche's system now carriers about 38,000 barrels of oil per day. Approximately one-half of this throughput is delivered to the company's storage tanks at Butte's Osage station. The system now has the capacity to transport an additional 7,000 barrels per day, and with the installation of booster equipment now

on hand, this capacity can be increased by 25,000 barrels or to 70,000 barrels per day. Belle Fourche's rates for transportation service are fixed by tariffs filed with the commission. They have been reduced voluntarily as through-put has increased and a further reduction is now apparent.

As indicated above, Butte is a common carrier of crude oil by pipeline whose operations are limited to the states of Montana and Wyoming. Its 16-inch trunk line originates at a point near Poplar, Montana, and extends generally southward therefrom through various oil fields in that state into Wyoming and across the eastern portion thereof to terminal facilities at Mt. Laramie and Guernsey, Wyoming. At these points, the oil carried by the trunk line, including the oil delivered to the company's Osage station by Belle Fourche, is transferred to Service Pipe Line Company, Platte Pipe Line Company, and Continental Pipe Line Company for further movement to Wyoming and out-of-state points. Butte is now completing booster stations in Wyoming designed to increase the capacity of its trunk line extending southward from its Osage station, from 68,500 barrels of oil per day to 96,000 barrels per day. Butte does not perform any gathering operations in Wyoming. According to the evidence, Butte now proposes to construct and thereafter operate a 10-inch oil pipeline,[1] costing approximately $2 million, for its Osage station to serve the five oil fields above named which are now being served by Belle Fourche, to be known and designated as "Wyoming Extension-Power River Basin." This line will be capable of initially transporting 20,000 barrels of oil per day. The transportation rates of Butte are established by joint tariffs filed with the Interstate Commerce Commission. The evidence of record is not clear as to the rates Butte proposes to charge for the movement of crude oil from the Wyoming fields it intends to serve, to the facilities of connecting carriers at the above-named Wyoming points, whether it intends to distinguish such rates from

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[1] See defendant's Exhibit "C" (Map) [omitted herein].

main-line transportation charges, and the division of rates with connecting carriers under joint tariffs which Butte intends to file with the Interstate Commerce Commission. Other evidence offered by Butte at the hearing relates to the alleged interstate character of its proposed operations in Wyoming. The company did not present any evidence with respect to the public convenience and necessity for its proposed gathering system.

Witnesses for complainant stressed the fact that Butte's proposed construction will not increase the amount of oil flowing from the involved fields into the channels of commerce, or create any new markets, therefor. These witnesses and intervenor's witness testified at some length concerning the probable and anticipated adverse effects of Butte's proposed Wyoming extension upon local interests, i.e., upon their operations, upon producers, and upon the public at large. They stated in substance that the proposed extension will:

1. Force Belle Fourche to abandon its facilities serving the Raven Creek field, where Shell Oil Company controls production.

2. Prevent Belle Fourche from placing its contemplated rate reduction in effect.

3. Reduce the volume of oil now carried by Belle Fourche, decrease its operating revenues, and precipitate a rate increase, because the overall reserves available for pipeline transportation are limited.

4. Inhibit Belle Fourche in the extension of its plant facilities to serve new oil fields due to the financial risk involved in making such extensions, thus thwarting the development of new production areas.

5. Eliminate production in marginal areas, thus decreasing oil reserves now available for pipeline transportation.

6. Decrease Plains' through-put and force the abandonment of production in the marginal fields it serves, if the loss of through-put necessitates an increase in its service rates.

7. Require Wyoming oil producers and not out-of-state consumers, to bear the brunt of the cost of Butte's proposed facility and the expense incident to the operation thereof.

8. Reduce the amount Wyoming producers will receive for their oil.

9. Damage the economy of Wyoming by reducing state and private royalty income and state ad valorem tax income from marginal production, and discourage the development of its natural resources.

The above-listed items reflect matters of substantial local concern, i.e., they are essentially local in character and not matters of national import requiring uniform federal regulation.

[1-3] Under the Wyoming Public Utilities Act, a pipeline utility must obtain a certificate of public convenience and necessity from the commission before commencing the construction of any proposed line or system, unless the commission's authority, i.e, its jurisdiction to require such a certificate, has been preempted by the United States.

Section 37-31, Wyoming Statues, 1957, provides:

"No public utility shall henceforth begin the construction of a line, plant, or system, or of any extension of such line, plant, or system, without leaving first obtained from the commission, a certificate that the present or future public convenience and necessity require or will such construction; . . . ."

Section 37-1, Wyoming Statutes, 1957, as amended, defines a public utility as follows:

"The term 'public utility,' when used in this chapter, shall mean and include every person that owns, operates, leases, controls, or has power to operate, lease, or control:

* * *

"(g) Any plant, property, or equipment for the transportation or conveyance to or for the public of oil or gas by pipeline, or used for the purpose of transporting, selling, or furnishing natural gas to any consumer or consumers within the state of Wyoming for industrial, commercial, or residential use; . . ."

Section 37-1(h), Wyoming Statutes, 1957, as amended, relates to exemptions under the act. It provides, in part:

"(h) None of the provisions of this chapter shall apply to interstate commerce, *except when a regulatory field has not been pre-empted by the United States Government; . . .* " (Emphasis supplied.)

The italicized words were added by § 2, Chap 157, Session Laws of Wyoming, 1961.

Butte's proposed operations in Wyoming will be those of a "public utility" within the meaning of said term as defined by § 37-1(g), *supra,* as it intends to use the proposed extension to its Wyoming facilities to transport crude oil "to or for the public." Butte is also a common carrier under Art. 10, § 7 of the Constitution of Wyoming, which provides:

"All corporations engaged in the transportation of persons, property, mineral oils, and mineral products, news or intelligence, including railroads, telegraphs, express companies, pipelines, and telephones, are declared to be common carriers."

Section 37-1(h), *supra,* authorizes the commission to regulate interstate commerce when a regulatory field has not been pre-empted by the United States Government. Therefore, it is clear that the commission has statutory authority to require Butte to demonstrate that the public convenience and necessity will be served by the construction of its proposed extension, unless such authority has been pre-empted, or the exercise thereof will impose a direct burden upon or unduly interfere with interstate commerce.

[4] It appears to us from the record in this proceeding that the principal function of Butte's proposed addition, like that of Belle Fourche's system, will be to gather oil in the Wyoming fields it intends to serve and feed the production therefrom to the company's main trunk line at its Osage station, i.e., the proposed extension will be substantially a local gathering and feeding operation preliminary to interstate trunk line transportation.

We do not think that Congress intended to pre-empt and remove the jurisdiction of the state of Wyoming to regulate, in the public interest, the construction of local gathering and feeder systems associated with main trunk lines transporting oil in interstate commerce, when it passed the Hepburn Amendment to the Interstate Commerce Act. Otherwise, the state would be powerless to regulate such systems, even though the construction thereof might jeopardize highly important interests of the state and its citizens, as the amendment, unlike other comprehensive federal regulatory acts, does not provide for the certification of new construction or abandonment of pipelines. The legislative history of the Hepburn Act reveals that it was not the purpose of the act, nor was it designed to regulate small feeder lines or gathering systems, but to break the monopolistic control of interstate trunk lines by the Standard Oil Company. The act simply made such lines common carrier facilities and required the operators thereof to submit to rate regulation by the Interstate Commerce Commission. In our opinion, this federal regulatory act is not so comprehensive or persuasive as to justify the conclusion that the commission's statutory jurisdiction in the public convenience and necessity field has been pre-empted thereby; and we, accordingly, find that the commission has jurisdiction and authority to determine whether the public convenience and necessity require the construction of Butte's proposed Wyoming extension; and that Butte will be in violation of Wyoming law if it proceeds with such construction, without obtaining a certificate of public convenience and necessity from the commission

pursuant to § 37-31, Wyoming Statutes, 1957, *supra*. We further find that Butte has not obtained a certificate of public convenience and necessity; and that its proposed pipeline may have important effects which are matters of direct and federal concern to the state of Wyoming and the public.

We think, and therefore find, that the exercise of our statutory jurisdiction in the premises will not impose any direct burden upon, prohibit, or in any way interfere with interstate commerce. We see no reason why the producers, which Butte intends to serve in the five Wyoming fields above named, cannot continue to route their production through Belle Fourche's system, if the public convenience and necessity require them to do so.

Our findings and conclusions herein are amply supported by two rather recent Supreme Court cases: Panhandle Eastern Pipe Line Co. v. Indiana Pub. Service Commission (1947) 332 US 507, 71 PUR NS 97, 92 L.ed 128, 68 S.Ct. 190, and Panhandle Eastern Pipe Line Co. v. Michigan Pub. Service Commission (1951) 341 US 329, 89 PUR NS 1, 95 L.ed 993, 71 S.Ct. 777.

Panhandle Eastern transports natural gas from Texas and Kansas fields into Indiana, Ohio, and Michigan. It furnished gas to local public utility distributing companies. In 1941 it informed the local distributing companies that wherever possible it intended to serve industrial customers direct, rather than through the local utilities. Such sales were not covered by the Natural Gas Act, and Panhandle Eastern felt that local commissions did not have the power to establish rates covering such sales. Consequently, Panhandle Eastern would be able to "establish higher industrial rates based on a competitive fuel basis."

Panhandle Eastern started selling industrial gas to Anchor-Hocking Glass Corporation in 1942. In 1944 the Indiana commission initiated hearings and concluded that the distribution by Panhandle Eastern to customers in Indiana was subject to regulation, and ordered Panhandle to file tariffs. The company obtained an order restraining the commission from enforcing its

order because of the commerce clause; the supreme court of Indiana reversed, holding that the commission had jurisdiction. The Supreme Court of The United States affirmed, saying, with respect to Panhandle Eastern (332 US at pp. 519-524, 71 PUR NS at pp. 104-107):

"... For the essence of its position, apart from standing directly on the commerce clause, is that Congress by enacting the Natural Gas Act has occupied the field, i.e., the entire field open to federal regulation, and thus has relieved its direct industrial sales of any subordination to state control.

"The exact opposite is the fact. Congress, it is true, occupied a field. But it was meticulous to take in only territory which this court had held the states could not reach. That area did not include direct consumer sales, whether for industrial or other uses. Those sales had been regulated by the states and the regulation had been repeatedly sustained. In no instance reaching this court had it been stricken down.

* * *

"... the states are not made powerless to regulate the sales in question by an supposed necessity for uniform national regulation but that on the contrary *the matter is of such high local import as to justify their control, even if Congress had remained wholly silent and give no indication of its intent that state regulation should be effective.* But in this case, in addition to those considerations taken independently, the policy which we think Congress has clearly delineated for permitting and supporting state regulation removes any necessity for determining the effect of the commerce clause independently of action by Congress and taken as operative in its silence.

"The attractive gap which appellant has envisioned in the coordinate schemes of regulation is a mirage. The judgment of the supreme court of Indiana is

"Affirmed." (Emphasis supplied.)

The second case involved similar facts. Michigan Consolidated Gas Company purchased gas from Panhandle Eastern and retailed it in the Detroit area to consumers and industrial users. The court describes the situation (341 US at p. 331, 89 PUR NS at pp. 2, 3):

"In 1945, appellant publicly announced a program of securing large industrial customers for the direct sale of natural gas in Michigan. In Detroit it offered to pay the city for the right to lay and operate its pipeline along the streets and alleys directly to large industrial customers. In October of that year appellant succeeded in securing a large direct-sale contract with the Ford Motor Company for gas at its Dearborn plant, located in the Detroit district. Ford was already purchasing substantial quantities of gas for industrial use at the Dearborn plant from Consolidated.

"Believing its interests and those of its customers were prejudiced by appellant's program, particularly the Ford contract, Consolidated filed a complaint with the Michigan Public Service Commission. Appellant appeared to contest the jurisdiction of the commission over such sales. After hearing, the commission ordered appellant to 'cease and desist from making direct sales and deliveries of natural gas to industries within the state of Michigan, located within municipalities already being served by a public utility, until such time as it shall have first obtained a certificate of public convenience and necessity from this commission to perform such services.' "

Panhandle Eastern obtained an injunction against the commission's order on the ground that it interfered with interstate commerce. The Michigan supreme court reversed and the Supreme Court of the United States affirmed, saying (341 US at pp. 333-336, 89 PUR NS at pp. 3-6):

"The sale to industrial consumers as proposed by appellant is clearly interstate commerce. Panhandle Eastern Pipe Line Co. v. Indiana Pub. Service Commission (1947) 332 US 507, 513, 71

PUR NS 97, 92 L.ed 128, 68 S.Ct 190; Pennsylvania Gas Co. v. New York Pub. Service Commission, 252 US 23, 28, PUR 1920E 1S, 64 L.ed 434, 441, 40 S.Ct 279. But the sale and distribution of gas to local consumers made by one engaged in interstate commerce is 'essentially local' in aspect and is subject to state regulation without infringement of the Commerce Clause of the federal Constitution. In the absence of federal regulation, state regulation is required in the public interest. Pennsylvania Gas Co. v. New York Pub. Service Commission, *supra* (252 US at p. 31, PUR 1920E at p. 22). See also opinion of Cardozo, J., in Re Pennsylvania Gas Co. 225 NY 397, PUR 1919C 663, 122 NE 260. These principles apply to direct sales for industrial consumption as well as to sales for domestic and commercial uses. Panhandle Eastern Pipe Line Co. v. Indiana Pub. Service Commission, *supra*, 332 US at pp. 514, 519, 71 PUR NS at pp. 101, 104, 105.

"The facts in the instant case show that the proposed sales are primarily of local interest. They emphasize the need for local regulation and the wisdom of the principles just discussed. *To accommodate its operations, appellant proposes to use the streets and alleys of Detroit and environs. A local utility already operating in the same area, Consolidated, receives its entire supply of natural gas from appellant.* A substantial portion of Consolidated's revenues is derived from sales to large industrial consumers. Appellant ignored requests of Consolidated for additional gas to meet the increased wants of its industrial customers. *Instead of attempting to meet increased needs through Consolidated, appellant launched a program to secure for itself large industrial accounts from customers, some of whom were already being served by Consolidated* . . . .

"Appellant concedes, as it must, that direct sales by it to industrial consumers are subject to state rate regulation under the *Panhandle-Indiana* decision, *supra*. It contends, however, that that decision does not comprehend its problem, reasoning

that the jurisdiction here asserted by the Michigan commission is the power to prohibit interstate commerce in natural gas.

"*Although the end result might be prohibition of particular direct sales, to require appellant to secure a certificate of public convenience and necessity before it may enter a municipality already served by a public utility is regulation, not absolute prohibition.* There is no intimation that appellant cannot deliver and sell available gas to Consolidated for resale to customers who have additional gas requirements. *It is no discrimination against interstate commerce for Michigan to require appellant to route its sales of gas through the existing certificated utility where the public convenience and necessity would not be served by direct sales. . . .*

"Thus, not only would there be two utilities using local facilities to accommodate their distribution systems, but they would be seeking to serve the same industrial consumers. *Appellant asserts a right to compete for the cream of the volume business without regard to the local public convenience or necessity. Were appellant successful in this venture, it would no doubt be reflected adversely in Consolidated's overall costs of service and its rates to customers whose only source of supply is Consolidated.* This clearly presents a situation of 'essentially local' concern and of vital interest to the state of Michigan.

. . . . .

"It does not follow that because appellant is engaged in interstate commerce it is free from state regulation or free to manage essentially local aspects of its business as it pleases. The course of this court's decisions recognizes no such license. See Cities Service case, *supra;* Panhandle-Indiana case, *supra;* Pennsylvania Gas Co. v. Commission, 252 US 23. Such a course would not accomplish the effective dual regulation Congress intended, and would permit appellant to prejudice substantial local interests. This is not compelled by the Natural Gas Act or

the Commerce Clause of the Constitution." (Emphasis supplied.)

The parallels between this case and the instant proceeding are self-evident.

ORDER

In conformity with our opinion and findings above set forth, Butte Pipe Line Company be and it hereby is ordered to comply with § 37-31, Wyoming Statutes, 1957, before proceeding with the construction of its proposed Wyoming extension.

(2)

Supreme Court, U.S.
FILED
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No. 84-1710

In the Supreme Court of the United States

OCTOBER TERM, 1985

BELLE FOURCHE PIPELINE COMPANY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA AND THE
FEDERAL ENERGY REGULATORY COMMISSION

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that petitioners may not bring suit to challenge the validity of subpoenas issued by the Federal Energy Regulatory Commission, on the ground that petitioners may challenge the validity of those subpoenas in a suit brought by the Commission to enforce its subpoenas once petitioners have refused to disclose the sought-after documents.

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A6) is reported at 751 F.2d 332. The opinion of the district court (Pet. App. B1-B26) is reported at 554 F. Supp. 1350.

JURISDICTION

The judgment of the court of appeals was entered on December 27, 1984. A petition for rehearing was denied on February 1, 1985 (Pet. App. C2). The petition for a writ of certiorari was filed on May 1, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Interstate Commerce Act (ICA), 49 U.S.C. (1976 ed.) 1 *et seq.*, prohibits "common carriers," which includes oil pipelines, engaged in interstate commerce from granting a preference or a rebate to, or discriminating against, any

person using their transportation facilities. 49 U.S.C. (1976 ed.) 1, 2, 3(1), 6(7). The ICA also authorizes the Federal Energy Regulatory Commission (FERC or the Commission)[1] to conduct investigations to determine whether a common carrier has engaged in such forbidden conduct and empowers FERC to subpoena persons and documents in the course of these investigations.[2] The Commission's subpoenas are not self-executing, however. Instead, the Commission may bring an action in federal court to compel compliance with its process (49 U.S.C. (1976 ed.) 12(2); 18 C.F.R. 1b.15),[3] and the district court may order a party to appear before the Commission and give testimony or produce the subpoenaed documents (49 U.S.C. (1976 ed.) 12(3)).

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[1]The Interstate Commerce Commission originally had jurisdiction over oil pipelines engaged in interstate commerce, but Congress transferred that regulatory authority to the FERC and the Secretary of Energy in 1977. The Secretary has delegated much of his authority to FERC. Sections 306 and 402(b) of the Department of Energy Organization Act, 42 U.S.C. 7155 and 7172(b); 42 Fed. Reg. 55450 (1977).

[2]Under Section 12(1)(a) of the ICA, 49 U.S.C. (1976 ed.) 12(1)(a), the Commission is required to "execute and enforce" the provisions of the ICA and has broad authority "to inquire into * * * the management of the business of all common carriers subject to the [ICA], and * * * of persons controlling, controlled by, or under common control with, such carriers * * *." Incident to this mandate, the Commission has the power "to require, by subpoena, the attendance and testimony of witnesses and the production of all books, papers, tariffs, contracts, agreements, and documents relating to any matter under investigation." *Ibid.*; see also 18 C.F.R. 1b.13, 1b.14.

[3]FERC's rules covering investigations of oil pipeline matters under the ICA are found at 18 C.F.R. Pt. 1b. Among other things, these rules authorize an investigating officer of the Commission to issue subpoenas (18 C.F.R. 1b.10, 1b.13) and authorize the Commission to initiate "appropriate action" to compel compliance with its process (18 C.F.R. 1b.15).

2. a. Petitioner Belle Fourche and its affiliates[4] operate an oil transportation system in Montana, North Dakota, and Wyoming (Pet. App. A2; R. 298).[5] One part of the system is a pipeline located entirely in Wyoming that Belle Fourche operates as a common carrier (*ibid.*; R. 298). The Wyoming pipeline delivers oil to several other pipelines that, in turn, transport oil from Wyoming to other states (*ibid.*; 5/13/83 Tr. 37, 40, 74-75, 138). Significant volumes of oil shipped over Belle Fourche's Wyoming system are either themselves transported outside of Wyoming by these pipelines or are exchanged for equivalent volumes of oil which are delivered out of state (5/13/83 Tr. 74-75, 153, 157, 168, 171, 176-177, 257, 277). At all times relevant to this case, Belle Fourche has had tariffs on file with FERC covering its Wyoming services (5/13/83 Tr. 40-41).

In 1973, the Interstate Commerce Commission (ICC) began a public investigation of the practices of Belle Fourche and its affiliates after Inexco Oil Co., an independent shipper, had filed a complaint with the ICC.[6] The investigation was later transferred to FERC (see page 2 note 1, *supra*). In late 1981, FERC granted Inexco's request to

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[4]The affiliates, who are also petitioners in this case, are as follows: Eighty-Eight Oil Company is the main shipper on the Belle Fourche line. Equitable Oil Purchasing Co. operates a gravity bank for the line, which compensates or charges the participating shippers for the different gravity values of their oil once it is injected into the line and mixed with oil of other value (see Pet. App. A2 n.2). Black Hills Trucking, Inc., is a common carrier trucking company that delivers oil from the wellhead to Belle Fourche for further transportation. Other petitioners, J. Frank Pottorff (now deceased) and H. A. True, Jr., were principals in the Belle Fourche companies (Pet. 1).

[5]The citations to the record are taken from the government's brief in the court of appeals.

[6]See *Inexco Oil Co.* v. *Belle Fourche Pipeline Co.*, 17 F.E.R.C. ¶ 61,309 (1980) (Order Terminating Proceedings).

withdraw its compiaint against Belle Fourche and terminated the public proceeding. However, FERC also decided to conduct a private investigation of Belle Fourche. See 18 C.F.R. Pt. 1b.

Shortly after the investigation began, the Commission issued four subpoenas to the principals of Belle Fourche, Eighty-Eight, Equitable, and Black Hills (5/13/83 Tr. 192-193).[7] These subpoenas related solely to Belle Fourche's oil pipeline system and its affiliated components. The Commission also issued subpoenas to oil pipeline companies which do business with Belle Fourche.[8]

b. After first allowing the Commission's officials to copy some of the subpoenaed documents,[9] petitioners filed a complaint in the United States District Court for the District of Wyoming seeking an injunction restraining any

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[7]A fifth was issued to a principal of True Oil Purchasing Company, which had been merged into Eighty-Eight. Gov't C.A. Br. 6 n.6.

[8]Thirteen subpoenas were served in 1982 upon shippers who used Belle Fourche's Wyoming pipeline, and all 13 shippers responded to the subpoenas. Fifteen additional subpoenas were served in mid-1982 upon other shippers; the response dates to these subpoenas were indefinitely extended pending the outcome of this suit. Six subpoenas served upon connecting oil pipelines were also indefinitely extended pending the resolution of this suit.

[9]In order to expedite the investigation, Commission officials indefinitely extended the return date on the subpoenas, agreed to examine the documents at petitioners' offices in Wyoming, rather than require petitioners to incur the expense of producing the documents at the Commission's headquarters in Washington, D.C., and agreed to perform and pay for the necessary copying (R. 62-67; 5/13/83 Tr. 94-95, 192-193). The Commission's attorneys copied approximately 6,000 pages of documents during their first visit (5/13/83 Tr. 57). During a second visit, petitioners told the Commission officials that petitioners intended to file a complaint in district court seeking declaratory and injunctive relief against the Commission's investigation (Gov't C.A. Br. 7). The Commission officials then left the premises without taking the additional documents that they had copied on that trip (*ibid.*). Petitioners thus err in asserting (Pet. 14) that the Commission has 13,000 documents of theirs.

further investigation by FERC (Pet. App. A2, B1-B2). Petitioners claimed that they were not subject to the jurisdiction of FERC under the ICA because the Wyoming pipeline operated only in intrastate commerce (*id.* at A2, B3). In their complaint, petitioners alleged that the district court had jurisdiction under the Department of Energy Organization Act, 42 U.S.C. 7192(b), the Administrative Procedure Act, 5 U.S.C. 701-702, and the Declaratory Judgment Act, 28 U.S.C. 2201-2202 (Pet. App. A2-A3, B3). The district court issued a temporary restraining order against any further investigation of petitioners by FERC (R. 30-31; see Pet. App. A3), but the court thereafter dismissed petitioners' complaint on the ground that none of these statutes gave the court subject matter jurisdiction over petitioners' claims (see Pet. App. B3). After petitioners amended their complaint to allege jurisdiction under 28 U.S.C. 1331 and 1337, the court consolidated the hearing on petitioners' request for a preliminary injunction with the trial on the merits of petitioners' complaint (Pet. App. B3; 5/13/83 Tr. 5). Following that hearing, the court issued an opinion and an order permanently enjoining the Commission from attempting to enforce its subpoenas (Pet. App. B1-B26).

The court first held that it had subject matter jurisdiction over petitioners' complaint under 28 U.S.C. 1331 and 1337, on the ground that the complaint raised questions under the ICA and the Fourth Amendment (Pet. App. B3-B10). The court rejected (*id.* at B9) the Commission's argument that petitioners were not entitled to obtain preenforcement judicial review of the validity of its subpoenas, on the ground that that argument "elevates form over substance," given the Commission's vigorous defense of its investigation. On the merits, the court found that the Wyoming pipeline was wholly within intrastate commerce and therefore was not subject to the Commission's jurisdiction (*id.* at B10-B15).

The court enjoined the Commission from attempting to enforce its subpoenas but refused to enjoin the Commission from investigating petitioners, on the ground that the Commission's "investigation is in pursuit of a clearly lawful purpose" (*id.* at B22) in that "FERC has initiated an investigation into possible violations of the I.C.A. which would have an impact on interstate commerce" (*id.* at B20).

c. The court of appeals reversed the district court's order and vacated the injunction (Pet. App. A1-A6). Relying chiefly on *Reisman* v. *Caplin*, 375 U.S. 440 (1964), which the court of appeals found to be "strikingly similar" to this case (Pet. App. A5), the court held that the district court should not have decided whether the Commission's subpoenas were valid because petitioners had an adequate legal remedy for challenging the validity of the subpoenas in a subsequent enforcement proceeding (*id.* at A5-A6). The proper response for petitioners, the court held, was to refuse to comply with the subpoenas, which would have required the Commission to initiate enforcement proceedings, at which petitioners could then present their defenses (*id.* at A5). The court also rejected petitioners' argument that the district court had jurisdiction at this stage of the proceedings because the Commission had counterclaimed for enforcement of its subpoenas (*id.* at A6). The court held that the Commission had simply objected to the district court's exercise of jurisdiction and had not specifically counterclaimed for enforcement of its subpoenas (*ibid.*).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Accordingly, review by this Court is not warranted.

Contrary to petitioners' contentions (Pet. 9-14), it is well settled that the respondent to an administrative subpoena may not challenge the validity of that subpoena in district

court under 28 U.S.C. 1331 or 1337 where he has an adequate remedy in the subpoena enforcement proceedings brought by the agency to compel compliance with its process. See, *e.g.*, *Reisman* v. *Caplin*, 375 U.S. 440, 446-450 (1964); *FTC* v. *Claire Furnace Co.*, 274 U.S. 160, 174-175 (1927); *General Finance Corp.* v. *FTC*, 700 F.2d 366, 368 (7th Cir. 1983); *United States* v. *LaJet, Inc.*, 685 F.2d 1378, 1382 (Temp. Emer. Ct. App. 1982); *Wearly* v. *FTC*, 616 F.2d 662, 665 (3d Cir.), cert. denied, 449 U.S. 822 (1980); *American Motors Corp.* v. *FTC*, 601 F.2d 1329, 1332-1337 (6th Cir.), cert. denied, 444 U.S. 941 (1979); *Atlantic Richfield Co.* v. *FTC*, 546 F.2d 646, 649-650 (5th Cir. 1977); *Anheuser-Busch, Inc.* v. *FTC*, 359 F.2d 487 (8th Cir. 1966) (Blackmun, J.). Preenforcement actions to invalidate an agency's subpoena such as this have traditionally been rejected where "the remedy specified by Congress works no injustice and suffers no constitutional invalidity [and] * * * provides full opportunity for judicial review before any coercive sanctions may be imposed" (*Reisman* v. *Caplin*, 375 U.S. at 450). In such circumstances, a party "may not bypass the specific method that Congress has provided for reviewing adverse agency action simply by suing the agency in federal district court under [28 U.S.C.] 1331 or 1337; the specific statutory method, if adequate, is exclusive" (*General Finance Corp.* v. *FTC*, 700 F.2d at 368).

The court of appeals correctly observed (Pet. App. A5) that this case is "strikingly similar" to *Reisman* v. *Caplin, supra*. There, the Internal Revenue Service (IRS) had subpoenaed a couple's financial records and related information from their accountants, and the couple's attorneys sought declaratory and injunctive relief against the IRS on the ground that the subpoenas sought the production of privileged information. 375 U.S. at 442. The Court held that the plaintiffs could not obtain a preenforcement order

enjoining the IRS from issuing its subpoenas, on the ground that the plaintiffs could present any defenses to the subpoenas without suffering any penalty and could obtain complete relief in an enforcement proceeding brought by the IRS to compel the accountants to produce the subpoenaed materials. *Id.* at 445-450. Here, as in *Reisman*, petitioners are in no present danger of suffering any sanction for a good faith refusal to withhold the subpoenaed documents. Furthermore, the statutory procedure authorizing the Commission to enforce its subpoenas, as the court of appeals observed (Pet. App. A5), is "virtually identical" to the procedure considered in *Reisman*. Compare 375 U.S. at 445-446, with pages 1-2, *supra*. Because the Commission's subpoenas are not self-enforcing, petitioners can present their defenses to the Commission's subpoenas, including their claim that FERC lacks jurisdiction over their operations, in an enforcement proceeding brought by the Commission to compel petitioners to turn over the subpoenaed documents. Alternatively, if the Commission does not seek to enforce its subpoenas, petitioners can raise their jurisdictional claims if FERC ultimately finds that petitioners have violated the ICA. Accordingly, petitioners are mistaken in claiming (Pet. 9) that they are "powerless" to obtain a judicial determination of FERC's jurisdiction over them; they simply must wait until such time as that question is properly raised.[10]

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[10]Because petitioners will suffer no prejudice from raising their claims in the context of an enforcement proceeding (see, *e.g.*, *American Motors Corp.* v. *FTC*, 601 F.2d at 1338), the court of appeals correctly held (Pet. App. A5-A6) that petitioners could not demonstrate the immediacy of injury necessary to meet the test of *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 148-149 (1967). In contrast to the situation in that case and in *Frozen Food Express* v. *United States*, 351 U.S. 40 (1956), upon which petitioners also rely (Pet. 12), here petitioners are subject to no penalties or other sanctions in advance of judicial enforcement proceedings. Finally, any alleged intra-circuit conflict

Petitioners argue (Pet. 9) that an enforcement proceeding does not provide an adequate remedy because they will suffer substantial injury from FERC's public disclosure of "trade secrets and confidential customer information" before any such proceeding takes place.[11] That claim is not well founded and is premature, however. Petitioners can ask the Commission to hold in confidence any information that they submit to the Commission. See 18 C.F.R. 1b.20. Alternatively, petitioners may refuse to divulge any allegedly confidential information and thereby force the Commission to initiate enforcement proceedings to obtain the documents in question. Petitioners may then assert any applicable privileges at that proceeding. See *Reisman* v. *Caplin*, 375 U.S. at 449; *American Motors Corp.* v. *FTC*, 601 F.2d at 1338-1339. In the meantime, as the court of appeals noted (Pet App. A6), because petitioners will suffer no penalty for their good faith noncompliance with the Commission's subpoenas, there is no legally cognizable "risk" that petitioners will be damaged by the court of

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between the Tenth Circuit's decision in this case and the other Tenth Circuit decisions cited by petitioners (Pet. 13, 19) is for the Tenth Circuit, not this Court, to resolve.

[11]Petitioners also suggest (Pet. 10) that they will be harmed by the seizure of documents from unaffiliated third parties. However, this Court has never held that the subject of an agency's investigation may obtain a restraining order preventing voluntary compliance by a third-party with an administrative subpoena. See *SEC* v. *Jerry T. O'Brien, Inc.*, No. 83-751 (June 18, 1984), slip op. 12. In any event, petitioners have failed to establish that the materials sought by the Commission's subpoenas consist of anything other than "routine business records in which the [petitioners] ha[ve] no proprietary interest of any kind * * * and which enjoy no established * * * privilege" (*Donaldson* v. *United States*, 400 U.S. 517, 530 (1971)). Indeed, the gravamen of petitioners' claim is that the FERC lacks jurisdiction over their business, not that the Commission has sought privileged information. Petitioners also enjoy no general privacy interest in documents that they have voluntarily transferred to third parties. See, *e.g.*, *United States* v. *Miller*, 425 U.S. 435 (1976).

appeals' ruling.[12] Accordingly, the controversy remains to be honed in further proceedings and review by this Court of the present decision is not warranted.[13]

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[12]Petitioners erroneously assert (Pet. 19) that *A.O. Smith Corp.* v. *FTC*, 396 F. Supp. 1108 (D. Del. 1975), aff'd and rev'd in part, 530 F.2d 515 (3d Cir. 1976), and *A.O. Smith Corp.* v. *FTC*, 417 F. Supp. 1068 (D. Del. 1976), support their claim that the district court could properly consider the merits of their complaint before the Commission brought an enforcement action. As the Third Circuit has since explained, *A.O. Smith* did not involve a challenge to an agency's issuance of a subpoena in the course of an investigation. Rather, that case involved an FTC resolution that required certain parties to submit extensive financial accounting data and that imposed substantial penalties for noncompliance. The Third Circuit held that the *Abbott Laboratories* criteria were met because the agency's action was final, the plaintiff would have incurred considerable expense in obeying the regulations, and the plaintiff was faced with stiff penalties for noncompliance. *Wearly* v. *FTC*, 616 F.2d at 666. No similar concerns exist here.

Petitioners also mistakenly rely (Pet. 19) upon *Servitron, Inc.* v. *ICC*, 380 F. Supp. 1344 (M.D. La. 1974), aff'd, 420 U.S. 999 (1975), and *Comet Electronics, Inc.* v. *United States*, 381 F. Supp. 1233 (W.D. Mo. 1974), aff'd, 420 U.S. 999 (1975). The court of appeals correctly observed (Pet. App. A6) that in those cases, unlike this one, the agency counterclaimed in the district court for enforcement of its subpoenas. Petitioners' fact-bound claim (Pet. 16-18) that FERC counterclaimed at trial for enforcement of its subpoenas was properly rejected by the court of appeals (Pet. App. A6) and does not warrant review by this Court.

[13]We also note that petitioners improperly cite (Pet. 4, 5, 8, 15) an internal Commission memorandum recommending that the Commission direct its staff to conduct a nonpublic investigation of Belle Fourche Pipeline Company and others. This memorandum was submitted to the district court for its in camera inspection at the hearing in this case. That court placed the memorandum under seal, but sent the memorandum to the court of appeals with the record of the case. Through a clerical error, the court of appeals sent a copy of the memorandum to Belle Fourche subject to a protective order prohibiting the memorandum from being copied or disclosed to anyone other than the attorneys representing petitioners. On the Commission's motion, the court of appeals later ordered Belle Fourche to return all copies of the memorandum. The court ruled that the memorandum would remain

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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under seal and would not be disclosed without a further order of the court. The Commission maintains that this information is confidential and privileged, as well as wholly irrelevant to the issues on appeal.

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No. 84-1710 (3)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

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BLACK HILLS TRUCKING, INC.,
J. FRANK POTTORFF AND H. A. TRUE, JR.
Petitioners,

v.

UNITED STATES OF AMERICA AND
FEDERAL ENERGY REGULATORY COMMISSION,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

REPLY BRIEF OF PETITIONERS TO "BRIEF OF RESPONDENTS IN OPPOSITION"

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REPLY BRIEF OF PETITIONERS TO "BRIEF OF RESPONDENTS IN OPPOSITION"

Belle Fourche Pipeline Company ("Belle Fourche"), Equitable Oil Purchasing Company, Eighty-Eight Oil Company, and Black Hills Trucking, Inc. and their principal officers, J. Frank Pottorff (now deceased) and H. A. True, Jr., (herein collectively referred to as "Targets") have petitioned for writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit dismissing for lack of subject matter jurisdiction a district court's declaratory judgment that petitioners were not subject to regulatory jurisdiction of the respondent Federal Energy Regulatory Commission ("FERC"), and an order of the district court enjoining the further enforcement of subpoenas *duces tecum* seeking evidence to prosecute the petitioners for the

violation of certain provisions of the Interstate Commerce Act, 49 U.S.C. Sections 1, et seq., which are inapplicable to non-jurisdictional entities, for the sole reason that the subpoenas were not "ripe" for review because "an adequate legal remedy existed for challenging the validity of the subpoena(s) in a subsequent enforcement hearing", without considering the irreparable injuries to be suffered by the targets if a determination of their jurisdictional status was deferred. The Respondent has filed its "Brief in Opposition" to the petition for certiorari. Petitioners hereby reply.

ARGUMENT IN REPLY

Both the respondents and the Court of Appeals have mischaracterized the issues in this case. The principal issue before the Supreme Court is whether the District Court acted properly when it determined the jurisdictional status of four targets to prevent FERC from seizing records from the targets and their customers and shippers when the undisputed facts showed that targets were wholly outside the regulatory jurisdiction of the agency and the documents seized did not relate to any matter within the scope of the Agency's regulatory or investigative authority. A secondary issue is whether the Court of Appeals erred in reversing the District Court's jurisdictional finding solely on the basis of *Reisman* v. *Caplin*, 375 U.S. 440 (1964) without giving any consideration whatsoever to the jurisdictional findings of the District Court.

Certain factual allegations and legal conclusions asserted by the FERC in its "Brief for the Respondents in Opposition" are wholly inaccurate and purposely misleading.[1] Such statements

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[1] For example, in paragraph 2a on page 3 of Respondents' Brief it is stated that "Petitioner Belle Fourche *and its affiliates* operate *an oil transportation system* in Montana, North Dakota, and Wyoming (record citations omitted)." (Emphasis supplied) This statement in respondents' Brief is, with the exception of the added words "and its affiliates," a verbatim quote from the opinion of the Tenth Circuit Court of Appeals in this case (Pet. App. A-2). It is an

and conclusions are obviously made by FERC as a diversionary tactic to mislead this Court, as they did the Court of Appeals, that the four targets are jurisdictional without directly arguing the point. Although the only real issue that ever existed, and the sole subject of a two day trial, was whether the four targets are subject to FERC regulatory jurisdiction, FERC assumes jurisdiction by oblique insinuations and argues that the only issue in the case is whether targets' objections to certain subpoenas were premature under *Reisman* v. *Caplin*. Petitioners have never contended that FERC was without authority to issue lawful subpoenas against jurisdictional entities, or that *Reisman* v. *Caplin* would not apply in such cases. The only subpoena questions presented in this case, as part of the agency abuse, concerned their incredible broadness as applied to non-jurisdictional targets.

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inaccurate characterization of the operations of Belle Fourche, particularly from the standpoint of the issues of this case. Belle Fourche actually has three pipeline systems only one of which, as observed by Judge Brimmer in his Memorandum Opinion (Pet. App. B-2), is involved in this controversy. It is located wholly in Wyoming, and the other two pipeline systems that were not involved in the investigation with which this case is concerned are engaged in interstate commerce crossing state lines. The gratuitous addition of the words "and its affiliates" by the Respondents confuses the issues of this case by leaving the erroneous impression that Belle Fourche's Wyoming System and its three affiliates have some relationship with interstate oil pipeline operations.

In addition, that same paragraph goes on to say that oil delivered over Belle Fourche's Wyoming system is ultimately transported from Wyoming to other states. That statement leaves the impression that the oil moves in interstate commerce which is contrary to the District Court's finding that Belle Fourche's Wyoming shipments are solely intrastate in nature.

Finally, the bald reference in that same paragraph to the fact that Belle Fourche has had tariffs on file with FERC covering its Wyoming line omits to tell the undisputed fact that the reason for filing FERC tariffs was to have them available should a customer request an interstate shipment. No showing was made at the trial of this case that any such requests had ever been made for several years prior to the trial.

Moreover, this is not a case that involves a forced seizure of evidence under subpoenas, but is one where the targets consented to an investigation which got out of hand. The record shows that FERC was invited to Casper, Wyoming to review petitioners' records to establish their non-jurisdictional status. However, instead of making jurisdictional inquiries, FERC's Office of Enforcement seized thousands of documents from the four targets relating solely to Belle Fourche's Wyoming system, and despite its having more than sufficient evidence to determine the controlling jurisdictional issues, continued to compile documentary evidence to prosecute the targets for violation of federal laws that are wholly inapplicable to non-jurisdictional entities. FERC also issued subpoenas against targets' shippers and customers for documents relating to targets' activities.

The evidence adduced at the trial demonstrated beyond any question of a doubt — and the Trial Court expressly found — that Belle Fourche's Wyoming system is an intrastate pipeline operation and had been strictly intrastate for many years prior to the trial and that its three affiliate targets are also intrastate in character and have no involvement whatsoever with Belle Fourche's interstate activities. This is not a case of mere abuse of authority over jurisdictional entities, but a case of total absence of jurisdiction.

The error, therefore, to which this Petition for Certiorari is addressed concerns not the procedural principles laid down by this Court in *Reisman* v. *Caplin*, but rather it calls specific attention to the failure of the Court of Appeals to address the jurisdictional issues which were the principal questions with which the parties and the District Court were concerned in the trial of this case. Petitioners have simply been deprived of their day in court by a procedural ploy. Clearly, the principle enunciated by *Reisman* v. *Caplin* upon which the Court of Appeals relied so heavily was a non-issue before the District Court. What the Petitioners are trying to accomplish through

this proceeding is to get this case back on the track where it belongs: to reinstate the District Court's decision on the jurisdictional issues which were actually tried, rather than on the subpoena enforcement non-issue that constituted the sole basis for the reversal of the District Court's judgment by the Court of Appeals.

As it stands, the Court of Appeals decision in this case is a dangerous precedent. It says in effect that the District Court can not step in to stop an agency investigation of targets who are totally outside the arena of the agency's regulatory authority — as contrasted with mere overreaching or abuse of agency authority. The decision also says that when a target consents to an investigation of its records on the belief that the agency will discover that it "has the wrong man," the target has absolutely no remedy to protect itself from the seizure of its documents from its office and from its shippers and customers when the agency blunders ahead without considering the fact that the records they have seized show that they are pursuing the wrong man. Under the Court of Appeals' decision here the targets' only alternative is to terminate its consent for the investigation and make itself subject to an enforcement proceeding in a court to be chosen by the offending agency, which in this case would certainly be in Washington, D.C., 1,700 miles away from the targets' headquarters offices, and where the same case would be tried a second time without the help of local customers and shippers. If that District Court accepts the view, urged here by FERC, that the jurisdictional issues are also premature for determination in a subpoena enforcement case, the targets will then be obliged to transport dozens of crates of documents those same 1,700 miles, or 3,400 miles round trip, and to permit further prolonged and unlimited searches to be made of its business files. Moreover, the same burdensome experiences can be anticipated by all other companies who may have done business with the target regardless of how little or how infrequently they

may have engaged in transactions over the course of several years. This is not helpful in a competitive business arena.

The disagreement FERC had with the findings by the District Court that the operations of Belle Fourche were beyond the jurisdictional authority of that agency and that court's other findings of agency abuse should have been submitted directly and without qualification to the Court of Appeals for determination rather than subverting those key issues by ignoring them and instead arguing the non-issue of an agency's authority to investigate under reasonable subpoenas.

Regardless of all this, *Reisman* v. *Caplin* is no authority for the deliberately misconceived issue advanced by FERC in the Court of Appeals and accepted by that appellate court. In *Reisman* v. *Caplin* the target was clearly jurisdictional and had the right under IRS regulations to object to the taking of documents in the possession of his accountants. In the case at bar, the targets are non-jurisdictional and have no right to object to the taking of their contracts and other documents from their shippers and customers.

Furthermore, in this case, judicial relief was not sought until after FERC had spent almost two weeks time taking enormous quantities of documents from the targets. During the course of this excessive activity it became painfully evident there was no stopping this invasion of the business nor would there be any effort on the part of FERC to make a necessary preliminary finding from examining the documents that it had no jurisdiction over the system it was investigating or the affiliated companies. The Agency admitted to the District Court that they were not giving any attention to the jurisdictional aspects of the case. This was not a case, therefore, of stopping an anticipated excessive or merely hypothetical exercise of authority, but was a real live case of burdensome excesses committed by investigators who were acting without any restraint to a point of violating basic rights of the petitioners. The action filed by petitioners in the

District Court, therefore, was not premature but was an emergency application of a tourniquet to stop the flow of vital documents through a wound already inflicted by the excesses and abuses of over-zealous agency investigators acting wholly outside their jurisdictional limits and investigating non-jurisdictional matters.

CONCLUSION

The Brief for the Respondents verifies Petitioners' contention that the FERC is using the procedural principles laid down by this Court in *Reisman* v. *Caplin, a non-issue before the District Court,* to side-step and avoid the District Court's declaratory judgment that petitioners were solely intrastate in nature and therefore not subject to FERC *regulatory* jurisdiction under the Interstate Commerce Act, 49 U.S.C. 1 *et seq.* The Court of Appeals did not address this jurisdictional issue although there was a full trial on the merits *on that sole issue,* participated in by FERC's General Counsel. The declaratory judgment on the jurisdictional issue was entered by the District Court to call a halt to ten years of agency abuse of the four non-jurisdictional entities that included wholesale taking of their records, business interference, harassments of their intrastate shippers and business customers, and interference with the state regulatory process. The excessive breadth of the subpoenas involved here was only a part of the agency abuse found by the District Court.

This Court should make it clear that *Reisman* v. *Caplin* is applicable to pre-enforcement subpoena cases only where jurisdictional entities are involved. Where other allegations of agency abuse are involved, or where the targets are clearly non-jurisdictional, the District Court has the right and duty to step in, as it did here. If this case stands, there will be no distinction between the rights of jurisdictional and non-jurisdictional entities insofar as agency investigations are concerned. When FERC appealed from the District Court's decision on the jurisdictional issues, and on the Court's findings of agency abuse, petitioners were

entitled to have such issues considered point by point by the Court of Appeals, not turned aside on the sole ground that *Reisman* v. *Caplan* applied to the subpoenas.

If the decision of the Court of Appeals here is affirmed, all administrative agencies are given free rein to abuse and harass non-jurisdictional entities for political or other purposes so long as the Agency does not invoke a district court's jurisdiction in a subpoena enforcement case. Applied here, the FERC Office of Enforcement can continue to abuse the four non-jurisdictional targets with impunity for another ten years without making any determination of their jurisdictional status. The agency can continue to seize petitioners' records from their shippers and customers, and give them the Hobson's choice of federal compliance or prosecution, even though they are already subject to state regulatory jurisdiction and a federal court has found them to be non-jurisdictional in a case from which FERC *did not appeal on that issue.*

The District Court's inherent right to act in agency abuse cases must not be taken away by the misapplication of procedural rules like those set forth in FERC's only defense, *Reisman* v. *Caplan.* By failing to address the jurisdictional issues the Court of Appeals has clearly deprived petitioners of their day in Court.

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CERTIFICATE OF SERVICE

I, Jack Vickrey, a member of the bar of this Court, hereby certify that I have this day caused copies of the foregoing REPLY BRIEF OF PETITIONERS TO "BRIEF OF RESPONDENTS IN OPPOSITION" to be placed in the care of the U.S. mail, certified mail, return receipt requested, postage prepaid, to counsel at the following addresses:

FEDERAL ENERGY REGULATORY COMMISSION	Mr. William H. Satterfield Mr. Jerome M. Feit Federal Energy Regulatory Commission 825 North Capitol Street, N.E. Washington, D.C. 20426
SOLICITOR GENERAL	Mr. Charles Fried Acting Solicitor General Department of Justice Washington, D.C. 20530
DEPARTMENT OF JUSTICE	Mr. Bruce G. Forrest Civil Division Department of Justice Washington, D.C. 20530
UNITED STATES ATTORNEY	Mr. Richard A. Stacey U. S. Attorney 2120 Capitol Avenue Cheyenne, Wyoming 82001

All parties required to be served have been served.

. . . . . .

JACK VICKREY
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PETITIONERS,
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DATE